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No. 04-1397

IN THE

Supreme Court of the United States

EDWARD GERBER, JESSE VALADEZ, AND
FRED LAWRENCE,
Petitioners,

v.

EMMANUEL SENYO AGYEMAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the correct standard for assessing an indigent plaintiff's request for appointed counsel under 28 U.S.C. § 1915(e)(1) is the "broad discretion" test used in the Second, Third, and Seventh Circuits, or the stricter "exceptional circumstances" test used in the Fourth, Sixth and Ninth Circuits?

2. Whether a trial court abuses its discretion by denying appointed counsel for a *pro se* plaintiff who is "literate . . . educated [and] able to read statutes and legal literature," but who "lacks legal training," as the Ninth Circuit held in this case?

PARTIES TO THE PROCEEDING

Petitioners are employees of the Corrections Corporation of America (CCA), a private prison corporation that contracts with various governmental entities, including the United States of America, to incarcerate detainees and convicted inmates.

Respondent is a former INS alien detainee who was incarcerated at CCA's Central Arizona Detention Center and Eloy Detention Center, pursuant to CCA's contract with the United States of America to house INS detainees and United States Marshal's Service inmates. Respondent alleged that Petitioners subjected him to excessive force and retaliated against him while he was housed in the CCA facilities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION AND JUDGMENT BELOW

The order of the court of appeals denying the petition for rehearing en banc is unreported and is reprinted in the Appendix to this Petition ("App") at 11a. The underlying opinion of the court of appeals is reported at 390 F.3d 1101 (9th Cir. 2004) (App. 1a-6a). The decision of the district court denying respondent's motion for appointment of counsel is unreported. (App. 7a-10a).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on December 6, 2004, and the order of the court of appeals denying the petition for rehearing en banc was entered on January 13, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISION INVOLVED

28 U.S.C. § 1915(e)(1) provides: "The court may request an attorney to represent any person unable to afford counsel."

INTRODUCTION

The circuit courts are split on the degree of discretion that district courts may use when assessing indigent plaintiffs' requests for appointed counsel under 28 U.S.C. § 1915(e)(1). While all the circuits recognize that the district courts' determination is discretionary, some circuits, such as the Second, Third, and Seventh, have adopted a broad approach, outlining certain factors for the district courts to consider, and giving them broad discretion to decide whether to grant such requests. Other circuits, notably the Fourth, Sixth and Ninth, hold that counsel may be appointed only in "exceptional circumstances." *Compare Maclin v. Freake*, 650 F.2d 885 (7th Cir.1981) (providing a list of factors for consideration and allowing district courts broad discretion in deciding whether to grant a request for appointment of counsel) *and Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir.1986) (recognizing some circuits have adopted a more "stringent" approach, but opting to follow the lead of the Seventh Circuit) *with Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993) (holding that district courts in the Sixth Circuit may appoint counsel to represent indigent civil litigants only when "exceptional circumstances" are present) *and Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980) ("[T]his court has limited the exercise of [discretionary power under § 1915] to exceptional circumstances"). The Third Circuit, in fact, has expressly

rejected the "exceptional circumstances" test that the Fourth, Sixth and Ninth Circuits use. *Tabron v. Grace*, 6 F.3d 147, 155, 158 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994) (holding that use of improper "extraordinary circumstances" standard and failure to provide other reasons for denying appointment of counsel warranted vacation of summary judgment and remand). This Court has not yet spoken on the issue.

Not only is the standard not uniform among the circuits, but those circuits taking the Seventh Circuit's "broad discretion" approach are not uniform on the factors that district courts should consider in assessing such requests; and those circuits requiring "exceptional circumstances" have not developed a uniform definition of what constitutes "exceptional circumstances." Because many courts treat the determination of whether to appoint counsel as a factual inquiry that will vary from case to case, and because this Court has not spoken on the issue, the result is that, for all practical purposes, there is no standard. The "standard" is so amorphous that courts essentially are free to do whatever their various sensibilities dictate.

In this case, for example, the Ninth Circuit held that the trial court abused its discretion in denying Respondent's request for counsel, even though the appellate court recognized that "Ageyman, it is obvious from his pleadings, is literate and educated. He was able to read statutes and legal literature. But he lacks legal training." (App. 6a). If a lack of legal training is the test of "exceptional circumstances"—which is the standard in the Ninth Circuit—then frankly all cases involving *pro per* plaintiffs will present exceptional circumstances. The result is to obliterate any discretion the trial court might have had to deny counsel to those educated, literate plaintiffs who are well able to articulate straightforward claims. Had this case arisen in a circuit that required

the court to examine discrete factors, the trial court's discretionary denial of counsel would likely have been upheld.

The court's holding in this case does not even meet the Ninth Circuit's own formulation of "exceptional circumstances"—namely, that plaintiff has demonstrated (1) the likelihood of success on the merits and (2) an inability to articulate his claims in light of the complexity of the legal issues involved. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Not only did the court find Respondent educated and articulate, but the Ninth Circuit never once mentioned the "likelihood of success on the merits" of Respondent's excessive force claim—the only claim the court addressed in its opinion. The court said only, "The magistrate judge who ruled on Agyeman's request for counsel knew very little of the likelihood of success on a claim that had not been properly framed." (App. 6a). In truth, there was nothing wrong with the way Respondent framed his excessive force claim. He alleged that Petitioners used excessive force when they executed a take-down occasioned by Respondent lunging at and biting officers trying to escort him to a cell. Indeed, he succeeded in getting that claim to trial. The only reason the court thought the excessive force claim was not "properly framed" was that Judge John Noonan (writing for himself and Judges Betty Fletcher and Sidney Thomas) decided *sua sponte* that Respondent should have filed a completely different lawsuit. Instead of an excessive force claim, the court thought Respondent should have challenged the prison's transport policy. In the court's words, "Is there any warrant for shackling the feet and binding the chest of an innocent detainee?" (App. 6a)—apparently a type of substantive due process claim.

So obsessed was the Ninth Circuit with its own "court-created claim" that during the appellate oral argument, the court gave Petitioners five days to produce "the prison policy that allowed defendants to 'place heavy restraints on detain-

ees who are having heart attacks'"—even though the prison's transport policy had nothing to do with plaintiff's take-down or his excessive force claim, was never challenged in this lawsuit, was not admitted into evidence or part of the record below, and even though the record was devoid of evidence that plaintiff was "having a heart attack," or was wearing "heavy" restraints, or was "bound at the chest"; and the record contained plenty of evidence that Respondent was anything but an "innocent detainee." To put it bluntly, the Ninth Circuit made up a new fact pattern and a new lawsuit and then chastised the district court for not appointing counsel under the actual facts and claims presented in this case. It was wholly inappropriate for the Ninth Circuit to abandon its role as objective arbiter of the facts and claims presented, and to become an advocate for Respondent, choosing different claims for him to bring, on non-existent facts, and ordering counsel appointed for him to assert this new claim in an attempt to find some "coherent theory for subjecting CCA to liability." (App. 6a).

Because federal law does not provide any uniform, articulable standard for when a trial court must appoint counsel for an indigent plaintiff, or for what constitutes "exceptional circumstances" if that is the test, the Ninth Circuit in this case was able to hold that the trial court abused its discretion in denying Respondent counsel even though Respondent is literate, articulate and able to read and understand statutes and legal literature and well articulated the claims he wanted to raise. Trial courts must now act as advocates for indigent plaintiffs, appointing counsel where the plaintiff lacks the legal training to raise completely different claims that the court suggests could be raised. This cannot be the standard for appointing counsel under 28 U.S.C. § 1915(e)(1). First, courts cannot be directed to advocate for certain litigants; and second, under such a standard, trial courts no longer have any discretion in the matter. Because every *pro per* litigant by definition lacks legal training, counsel would have to be

appointed in every case. This new standard will likely increase the amount and cost of litigation in the lower courts and drain those courts of the resources that should be preserved for the truly deserving indigent *pro per* litigants who cannot articulate their complex claims. "Every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause." *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir.1989). Certiorari should be granted to set forth a uniform standard and to correct this dangerous precedent.

STATEMENT OF THE CASE

The INS arrested Respondent on February 24, 1997 on a bench warrant for passing a bad check, or for DUI, and he was incarcerated as a pretrial detainee at CCA's Eloy Detention Center. Respondent was transferred during the course of his detainment, but ultimately ended up back at Eloy. Respondent's initial complaint alleged that Petitioners were deliberately indifferent to his medical needs, subjected him to excessive force, and retaliated against him for filing numerous lawsuits against CCA and its employees. Counts I, III and VI were dismissed, and Count V was withdrawn. Respondent took two counts of his Second Amended Complaint to trial—Count II (retaliation) and Count IV (excessive force).

In the single pre-trial request for counsel that Respondent Agyeman made to the Arizona District Court—two and a half years before trial—Respondent complained *only* that the Maricopa County Jail where he was located at the time lacked a law library, and that "counsel is necessary to depose the opposing party." Shortly thereafter, Respondent was transferred to an INS facility in Florence, Arizona, thus mooting

his claim of no law library facilities. During the next three years, Respondent never again asked for counsel.[1]

On this record, the Magistrate Judge denied the request to appoint counsel. In a three-page order, the trial court ruled that (1) there is no constitutional right to appointment of counsel in a civil case; (2) this case was beyond the pleading stage for which the constitutional right of access to the courts would apply; (3) Mr. Agyeman had not demonstrated a likelihood of success on the merits; (4) he had not shown that any difficulty he was experiencing derived from the complexity of the case; (5) he had already been transferred to an INS facility in Florence, Arizona, thus mooting his complaint of no law library at the Maricopa County Jail; and (6) his desire to depose a party did not entitle him to appointment of counsel. (App. 7a-10a).

Respondent thereafter fully litigated his case, well articulating his claims in amended complaints, and filing many, many pleadings containing appropriate legal citations. He survived summary judgment on two claims, citing legal authority and submitting a separate statement of facts and affidavit; participated in filing the joint pretrial statement; filed a twelve-page trial brief setting forth his positions and citing legal authorities; submitted a motion in limine; submitted proposed jury instructions; at trial questioned the witnesses and testified himself; then filed a motion for new trial, and a Rule 60(b)(3) motion.

The case was tried on two straightforward claims. The first claim dealt with the reason Respondent was kept in segregation. Respondent claimed it was in retaliation for his having filed complaints and lawsuits regarding his incarceration.[2]

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[1] On the day trial began, Respondent did ask the trial judge "if it's too late to make a motion for appointment of counsel?"

[2] Mr. Agyeman has litigated, on his own, eighteen separate federal and state civil lawsuits. *See Agyeman v. CCA*, Ninth Circuit No. 04-16672;

On the other hand, Petitioners adduced evidence that it was the result of Respondent's repeated disciplinary rule infractions—for example, the time Respondent told an officer that he was a "fucking buffoon" and that his mother was a "fucking slut," and then had to be held back from advancing on the officer; or the time he threw a dinner tray at an officer, hitting him and splashing food all over his shirt, stating, "All you officers are fucking assholes"; or the time when an officer told him repeatedly to stop climbing the fence and yelling at another detainee, and Respondent told the officer, "No, Fuck you"; or when Respondent called a transporting officer "bloody asshole, fucking baboon and an idiot," then told him, "I will fix your fucking white ass. You will see that I will fucking get you"; or the time Respondent urinated through his cell door, then refused to cooperate with the investigation of such. These and a myriad of other incidents demonstrated to the jury that Respondent was not, as the Ninth Circuit termed him, an "innocent detainee." (App. 6a). In any event, all the jury had to decide here was whether it believed Respondent's or Petitioners' reasons for housing Respondent in segregation.

Agyeman v. Ashcroft, Ninth Circuit No. 03-72855; *Agyeman v. Kern County Sheriff*, Ninth Circuit No. 02-17076; *Agyeman v. Coachman*, Ninth Circuit No. 01-16910; *Agyeman v. INS*, Ninth Circuit No. 99-70396; *Agyeman v. Baranick*, Ariz. District Court No. 04-CV00936; *Agyeman v. CCA*, Ariz. District Court No. 04-CV00863; *Agyeman v. CCA*, Ariz. District Court No. 03-CV01229; *Agyeman v. INS Officials*, Ariz. District Court No. 02-CV01618; *Agyeman v. CCA*, Ariz. District Court No. 02-CV01618; *Agyeman v. CCA*, Ariz. District Court No. 99-CV01366; *Agyeman v. Gluch*, Ariz. District Court No. 99-CV01450; *Agyeman v. Zurich Insurance Co.*, Ariz. District Court No. 99-CV01501; *Agyeman v. CCA*, Arizona District Court No. 98-CV00188; *Agyeman v. CCA*, Ariz. District Court No. 97-CV02159; *Agyeman v. Rodman*, Pinal County Superior Court No. 1100-CV-200400635; *Agyeman v. CCA*, Pinal County Superior Court No. 1100-CV-200300864; and *Agyeman v. City of North Las Vegas*, Nevada District Court No. CVS99-1487.

The issue in the second claim was whether the Petitioner officers used excessive force when executing a take-down of Respondent. Respondent had refused to be transported to a community medical center in restraints, stating that restraints were "silly and childish." As two officers were escorting plaintiff to a medical isolation cell instead, Respondent escaped the officers, lowered his head, and lunged at another officer in an attempt to bite him on the neck. The officer placed plaintiff in a headlock and, in Respondent's own words, began "placing [him] on the floor," when Respondent bit both him and Captain Lopez, who had come to assist, on the fingers. Respondent did not claim any soft tissue injuries, or other medically complex physiological or psychological injury, and in fact refused any medical assessment or treatment. Only fact witnesses testified at trial. There were no expert witnesses, and no complicated medical records. There was no issue of whether restraints were appropriate or not. The **only** issue for the jury was whether the force the officers used for the take-down was reasonable under the circumstances. After a three-and-a-half day trial, the jury took an hour to find in favor of defendants on all claims.

In a published opinion, the Ninth Circuit reversed, holding that the trial court had abused its discretion in denying Respondent's request for counsel. Regarding Respondent's ability to articulate his claims, the court said only, "Ageyman, it is obvious from his pleadings, is literate and educated. He was able to read statutes and legal literature. But he lacks legal training." (App. 6a). Indeed, at trial, Respondent claimed to have obtained a masters' degree from the London School of Economics.

As to the likelihood of success requirement, the court's only mention was that, "The magistrate judge who ruled on Agyeman's request for counsel knew very little of the likelihood of success on a claim [referring to the excessive force claim] that had not been properly framed." (App. 6a).

Again, the only reason the court thought the excessive force claim was not "properly framed" was that the court decided *sua sponte* that Respondent could have filed a completely different lawsuit. Instead of an excessive force claim, the court thought Respondent could have brought a claim asking "Is there any warrant for shackling the feet and binding the chest of an innocent detainee?" (App. 6a). So obsessed was the court with this new "court-created claim" that during the appellate oral argument, the court gave Petitioners five days to produce "the prison policy that allowed defendants to 'place heavy restraints on detainees who are having heart attacks'"—even though the prison's transport policy had nothing to do with plaintiff's excessive force claim, was never challenged in this lawsuit, was not admitted into evidence or part of the record below, and even though the record was devoid of evidence that plaintiff was "having a heart attack," or was wearing "heavy" restraints, or was "bound at the chest"; and the record contained plenty of evidence that Respondent was anything but an "innocent detainee." To put it bluntly, the Ninth Circuit made up a new fact pattern and a new lawsuit and then chastised the district court for not appointing counsel under the actual facts and claims presented in this case.[3]

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[3] Defense counsel strenuously objected to Judge Thomas's order to produce its transport policies after the appellate oral argument, but nevertheless did so. While thus not part of the district court's record on appeal, those policies confirm that all inmates—detainees and convicts alike—must be transported outside the facility in "handcuffs, waist chain and leg restraints" before moving them outside to a vehicle—and for good reason, as Respondent's assault and bites on the officers in this case well demonstrate. Any request for a reduced level of restraint must be made by a physician or Health Services Supervisor in writing, recording the detainee's physical limitation and the consequences a particular type of restraint might have on the detainee if used. This record contained no evidence whatsoever of a doctor's written request for a reduced level of restraint for Respondent.

The Ninth Circuit also manufactured what it called a "triple complexity" to justify its holding that appointed counsel was required in this case. In truth, not one of the three asserted "complexities" existed. Focusing only on the excessive force claim, the court's first offered complexity was that Respondent could have added the United States as a defendant under the Federal Tort Claims Act, and also sued CCA either directly in tort, or as an added defendant to the FTCA claim. (App. 4a-5a). But the United States would not have been a proper defendant on plaintiff's excessive force claim. The federal government had nothing to do with the amount of force CCA's employees used for plaintiff's take-down. And adding CCA as a defendant to this claim would have made no substantive difference whatsoever. The same evidence was proffered and the same jury instructions were given as would have been had CCA been a defendant. The jury simply found no excessive force. Plainly, the addition of the United States or CCA as defendants to this claim was not a "complexity" that required appointment of counsel.

The Ninth Circuit's second "complexity" was that the case against the individual employees should have been brought under *Bivens*, and not under § 1983 as Respondent had cited. (App. 5a). But it is completely irrelevant that *Bivens* was the correct jurisdictional basis rather than 42 U.S.C. § 1983. *Bivens* actions and § 1983 actions are analogous; the only difference is that *Bivens* applies to constitutional violations by federal, rather than state officials. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.1996) (Section 1983 and Bivens actions identical except for requirement of state actor under § 1983 and federal actor under *Bivens*). For this very reason, no one raised this technicality below; no one moved to dismiss on this basis; the case went to trial despite plaintiff's reliance on § 1983 instead of *Bivens*; and the jury instructions that were given were no different than those that would have been given had plaintiff stated the correct jurisdictional basis. Even on appeal, Petitioners simply noted in passing that the

correct legal basis for the suit was *Bivens* instead of § 1983. This was certainly not a "complexity" of the case that required appointment of counsel.

The court's third cited complexity was that "an issue existed as to whether the prison's policies requiring restraints when transporting inmates applied to a non-criminal detainee like plaintiff (App. 5a), but plaintiff, who lacks legal training, did not "properly frame" this issue or ask for those policies (App. 5a, 6a). Of course, the propriety of requiring restraints to transport Respondent was not a claim in this case in any way, shape or form. Furthermore, if the court was suggesting that **this** case was complex because it thought Respondent could sue the federal government and CCA on a **different** claim—i.e., for requiring transport restraints for detainees—the court respectfully was wrong.[4] No prison in the nation allows detainees to be transported outside the facility without restraints; and no prison in the nation allows a detainee to direct when a reduced level of restraint will be used. A written doctor's order is required before any inmate can be transported with a reduced level of restraint. Not surprisingly, the Ninth Circuit did not cite any authority showing that Respondent would likely have succeeded on such a claim. In truth, such a challenge to the prison's policy to restrain detainees for transport would have flown in the face of *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (conditions of pretrial detention reasonably related to a legitimate governmental objective are constitutional); and *Turner v. Safley*, 482 U.S. 78, 89 (1987) (jail officials, more experienced in the behavior of inmates, must have the latitude "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). Thus, the

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[4] The panel apparently thought this might have been a "coherent theory for subjecting CCA to liability" (App. 6a)—a notion that might have suited the Ninth Circuit's sensibilities, but which is completely improper for an objective arbiter of the facts and claims brought before it.

court's third cited "complexity" was not a viable justification for requiring appointed counsel in the case that Respondent did file.

The panel cited one last "fact" that it said "enhanc[ed] the exceptional character of the case," and that was "the anomaly of incarcerating a person on non-criminal charges and confining him for seven years." (App. 6a). But the length of plaintiff's detainment was never an issue, a claim, or an argument in this lawsuit. In fact, the Ninth Circuit had already ruled in a prior opinion that the length of Respondent's incarceration was constitutional. *Agyeman v. Coachman*, 74 Fed. Appx. 691, 694 (9th Cir. 2003). In that same decision, the court found that it was Respondent himself who had substantially caused the delays with which the court seemed to be so concerned in this case. The length of Respondent's detainment was not an exceptional circumstance that required appointed counsel here.

Petitioners filed a petition for rehearing en banc, which was denied on January 13, 2005. (App. 11a).

REASONS FOR GRANTING THE PETITION

This Court has not yet spoken on the standard that lower courts should use when determining indigent plaintiffs' requests for appointment of counsel under 28 U.S.C. § 1915 (e). Further, the circuit courts are split on what standard should be used. While all the circuits recognize that the district courts' determination is discretionary, some circuits, such as the Second, Third, and Seventh, have adopted a broad approach, outlining certain factors for the district courts to consider, and giving them broad discretion in deciding whether to grant such requests. Other circuits, notably the Fourth, Sixth and Ninth, hold that counsel may be appointed only in "exceptional circumstances." Yet even the circuits using the factor approach are not uniform on what factors to consider; and the circuits that utilize an "exceptional circumstances" test have

not developed a uniform definition of what constitutes "exceptional circumstances." For all practical purposes, there is no standard for courts to follow.

In this case, for example, the Ninth Circuit held that the district court abused its discretion in denying counsel, even though it found Respondent educated, literate, articulate and able to understand statutes and legal pleadings, and even though Respondent has prosecuted no less than eighteen lawsuits on his own. The Ninth Circuit chastised the district court for denying counsel when Respondent was able to well articulate his claims, and did not show a likelihood of success on the merits, on the ground that Respondent "lacked legal training" and did not bring a different lawsuit against Petitioners that the court thought could be a "coherent theory for subjecting CCA to liability"—even though, in truth, that different lawsuit would not likely have succeeded. If this is truly the standard for appointing counsel, then with all due respect, trial courts no longer have any discretion to deny requests for counsel. They can no longer objectively examine the cases brought before them. Instead, they must advocate for plaintiffs, and appoint counsel if the courts can manufacture ideas for new claims or theories plaintiffs might try in order to subject defendants to liability, even though these plaintiffs have well articulated the claims they wanted to bring.

The federal statute that governs appointment of counsel for indigent plaintiffs throughout the nation should be given a consistent interpretation throughout the nation. At the moment, there is no consistent interpretation, and as a result, the denial of counsel was ruled an abuse of discretion in this case whereas it likely would not have been had the case arisen in a different circuit using a factor test. Furthermore, because this opinion directs trial courts to appoint counsel even though the plaintiff is literate and articulate, but lacks legal training, regardless of the merits of the claims he raised, the opinion

will likely cause an increase in the amount and cost of litigation, and drain the lower courts' resources that should be preserved for the truly deserving indigent *pro per* litigants who cannot articulate their complex claims. "Every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause." *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir.1989). Certiorari should be accepted to set forth a uniform standard and to correct this dangerous precedent.

I. FEDERAL CIRCUITS ARE SPLIT ON THE DEGREE OF DISCRETION THAT DISTRICT COURTS MAY USE IN DETERMINING REQUESTS FOR APPOINTED COUNSEL.

The circuits are split as to the degree of discretion that district courts may use in ruling on requests for appointment of counsel. While all the circuits recognize that the district courts' determination is discretionary, some circuits, such as the Second, Third, and Seventh, have adopted a broad approach, outlining certain factors for the district courts to consider, and giving them broad discretion in deciding whether to grant such requests. Other circuits, notably the Fourth, Sixth and Ninth, hold that counsel may be appointed only in "exceptional circumstances." *Compare Maclin v. Freake*, 650 F.2d 885, 887-88 (7th Cir.1981) (providing a list of factors for consideration and allowing district courts broad discretion in deciding to grant a request for appointment of counsel) and *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir.1986) (recognizing some circuits have adopted a more "stringent" approach, but opting to follow the lead of the Seventh Circuit) *with Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (in civil actions the appointment of counsel should be allowed only in exceptional cases), *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993) (district courts in the Sixth Circuit may appoint counsel to represent indigent civil litigants only when "exceptional circumstances" are present),

and *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980) ("[T]his court has limited the exercise of [discretionary power under § 1915] to exceptional circumstances"). The Third Circuit, in fact, has expressly rejected the "exceptional circumstances" test that the Fourth, Sixth and Ninth Circuits use. *Tabron v. Grace*, 6 F.3d 147, 155, 158 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994) (holding that use of improper "extraordinary circumstances" standard and failure to provide other reasons for denying appointment of counsel warranted vacation of summary judgment and remand). On the other hand, the First and Fifth Circuits use the words "exceptional circumstances," but then engage in the factor analysis of the Seventh Circuit. *See DesRosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991); *Cox v. Mitchell*, 2004 WL 2545034 (N.D.Tex. 2004).

Those circuits that give trial courts broad discretion based on a number of factors are not even uniform on what factors the trial courts should consider. In fact, some of the circuits' factors are completely different For example, the Second Circuit considers (1) whether the indigent's claims seem likely to be of substance; (2) whether the indigent is able to investigate the crucial facts concerning her claim; (3) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder; (4) whether the legal issues involved are complex; and (5) whether there are any special reasons why appointment of counsel would be more likely to lead to a just determination. *Hendricks v. Coughlin*, 114 F.3d 390, 392 (2d Cir.1997). The D.C. Circuit considers whether plaintiff can afford an attorney, the merits of the plaintiff's case, plaintiff's efforts to secure counsel and plaintiff's capacity to present the case adequately without need of counsel. *Poindexter v. F.B.I.*, 737 F.2d 1173, 1185 (D.C. Cir. 1984). The Tenth Circuit considers the merits of the plaintiff's claims, the nature of the factual issues raised in the claims, the plaintiff's ability to present his claims, and the complexity of the legal issues

raised by the claims. *Long v. Shillinger*, 927 F.2d 525, 527 (10th Cir.1991). The Third Circuit considers (1) the plaintiff's ability to present his case, including his education, literacy, prior work experience, prior litigation experience, and ability to understand English; (2) the difficulty of the legal issues involved in the case; (3) the ability of the plaintiff to investigate his case, including limits related to his incarceration, the extent of discovery, and the effect of complex discovery rules; (4) whether the outcome of the case depends upon witness credibility or expert testimony; (5) the time at which counsel becomes necessary, such as at trial; and (6) the availability of volunteer legal services, weighing the amount of this resource against the needs of the individual case. *Tabron v. Grace*, 6 F.3d 147, 155-157 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994). Had this case arisen in one of these circuits, the appellate court would have been hard pressed to find the denial of counsel an abuse of discretion, as the Ninth Circuit did.

Among the circuits using the extraordinary circumstances test as well, courts have not developed a uniform standard of what constitutes extraordinary circumstances. Most courts have treated this as a factual determination that will vary from case to case. Because the "extraordinary circumstances" test is amorphous and truly standardless, most courts simply conclude that extraordinary circumstances do not exist without providing guidance on their analysis. The Ninth Circuit thus had no real check on its ability to manufacture reasons to reverse this jury verdict.

This non-standard is unacceptable. Given the "significant practical restraints" on the trial courts' discretion—including "the ever-growing number of prisoner civil rights actions filed each year in the federal courts; the lack of funding to pay appointed counsel; and the limited supply of competent lawyers who are willing to undertake such representation without compensation," *Tabron v. Grace*, 6 F.3d 147, 157 (3d

Cir.1993), the lower courts need guidance and a firm understanding of a uniform standard so as to know when appointed counsel is required and when it is acceptable to deny counsel.

II. THE NINTH CIRCUIT'S OPINION CANNOT BE RECONCILED WITH ANY OF THE CIRCUITS' STANDARDS FOR APPOINTING COUNSEL

While the standard for appointing counsel is not uniform among the circuits, nevertheless, a trial court's denial of counsel cannot be an abuse of discretion unless the denial resulted in fundamental unfairness impinging on the plaintiff's due process rights. *Maclin v Freake*, 650 F.2d 885, 886 (7th Cir. 1981). Stated another way, a circuit court will override a district court's decision to deny appointed counsel "only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer." *Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir.), *cert. denied*, 114 S.Ct. 438 (1993).

Respondent in this case was in no way deprived of any of his due process rights—no matter which circuit's formulation of the federal standard is used. When he sought counsel, he did not even complain that the issues were too complex, or that he was unable to articulate his claims. He complained only about the lack of law library facilities, an issue that became moot shortly thereafter. After that, he well articulated his claims and got them to trial. He filed dozens of pleadings that cited appropriate legal authority. He survived summary judgment motions, and examined and cross-examined witnesses at trial. Respondent demonstrated that he is educated, literate, and very well versed in the civil justice system—having filed eighteen other lawsuits and claiming to have a master's degree from the London School of Economics. And the issues he raised were just not dif-

ficult. There were no complex medical records or injuries, no expert witnesses, no complicated legal analyses involved, no knotty statutory issues. There were two straight-forward issues—excessive force and retaliation—on which the jury was asked to believe either Respondent's story or Petitioners' story. It was simply not "plain beyond doubt before the trial began" that the issues were so difficult relative to Respondent's capabilities that it was "impossible for him to obtain any sort of justice" without a lawyer.

On this record, for the Ninth Circuit to reverse the jury's verdict on the ground that the trial court abused its discretion in failing to appoint counsel frankly obliterates any kind of discretion that the trial court should have had to determine whether Respondent demonstrated the requisite exceptional circumstances. This is especially true given the state of the record at the only time Respondent made a request for counsel to the Arizona District Court—two and a half years before trial—when Respondent complained only about the lack of a law library at the County Jail, which issue became moot when he was transferred shortly thereafter. Denial of counsel under these circumstances could not have been an abuse of discretion—under any of the circuits' formulations of that standard—as the Ninth Circuit held.

A. Educated, literate plaintiffs who can articulate their claims are not entitled to appointed counsel under any circuit's formulation of the federal standard.

Petitioners could not find any other court in the country that has ruled the denial of counsel an abuse of discretion where the plaintiff is literate, educated, and able to articulate the straightforward claims he brought. Instead, trial courts are held to abuse their discretion in denying counsel when the indigent plaintiff demonstrates some kind of physical or mental impairment, or a limited knowledge of the English language, such that the plaintiff cannot adequately present his

case. *See, e.g., Castillo v Cook County Mail Room Dep't*, 990 F.2d 304 (7th Cir. 1993) (trial court erred in failing to *sua sponte* appoint counsel for indigent inmate, where inmate presented colorable claim that prison officials wrongfully opened his legal mail outside his presence, and inmate obviously had limited skills with English language); *McCarthy v Weinberg*, 753 F.2d 836 (10th Cir. 1985) (abuse of discretion to deny counsel where prisoner asserted colorable claim, but was unable to present it due to multiple sclerosis requiring him to appear in court in wheelchair, eyesight was failing, hearing was unpredictable, ability to communicate was impaired, he was unable to read medical records offered into evidence by defendant, and did not understand trial proceeding and nature and application of rules of evidence; denial of appointment of counsel resulted in trial that was fundamentally unfair); *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984) (trial court abused discretion in denying appointed counsel where plaintiff barely able to read and write, and had no experience with the law or legal procedures), *abrogated on other grounds, Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296 (1989). *Cf. Hetzel v Swartz*, 917 F Supp 344 (M.D. Pa. 1996) (appointing counsel for former inmate alleging improper counseling and treatment for AIDS while incarcerated; plaintiff had poor health and marginal literacy, and issues of proper treatment for terminal disease were complex).

Where a plaintiff is literate, educated, articulate, and well versed in legal proceedings, every other circuit in the nation would likely have found the denial of counsel to be well within the trial court's discretion. *See, e.g., Cookish v Cunningham*, 787 F.2d 1 (1st Cir. 1986) (no appointed counsel where facts straightforward, no difficult or complex factual issues or investigative difficulties, inmate did not exhibit functional difficulty that would have prevented him from adequately preparing and presenting case); *Richardson v Henry*, 902 F.2d 414 (5th Cir. 1990) (upholding denial of

counsel where evidence showed that issues were not complex and prisoner could competently represent himself); *Childs v Duckworth*, 705 F.2d 915 (7th Cir. 1983) (denial of counsel upheld; state prisoner alleging denial of right to practice religious beliefs was articulate, important issues were within the prisoner's knowledge, and most facts were undisputed); *Mosby v Mabry*, 697 F.2d 213 (8th Cir. 1982) (state prisoner, who had filed 40 lawsuits alleging numerous civil rights violations by various prison personnel, had demonstrated familiarity with judicial procedure and the substance of his claims); *Lockert v Faulkner*, 574 F. Supp. 606 (N.D. Ind. 1983) (nothing in record indicated existence of physical or mental impairment that would effectively hamper or preclude prosecution of claim, plaintiff's pleadings were good quality and showed care in framing and arguing legal questions); *Davidson v. Goord*, 259 F. Supp. 2d 238 (W.D.N.Y. 2003) (Pro se inmate who was experienced with § 1983 litigation, articulate, and cognizant of basic procedural requirements was not entitled to appointed counsel in suit alleging violations of his right of access to courts and counsel, where suit did not present difficult factual or legal issues); *Hill v. Davidson*, 844 F. Supp. 237 (E.D.Pa. 1994) (inmate not entitled to appointed counsel where he appeared to be literate and educated, legal issues were not very complex, inmate could use law library upon written request, and legal issues were not complex).

Because the Ninth Circuit could not find Respondent unable to articulate the claims he raised, to justify its decision, it manufactured a wholly different lawsuit and cited Respondent's "lack of legal training" as the reason Respondent himself did not raise it, articulate it, or show its supposed merit. This was inappropriate. Courts are supposed to preserve their legitimate advisory role, and refrain from transforming themselves into the "role of an advocate seeking out the strongest arguments and most successful strategies for a party.'" *Strickler v. Waters*, 989 F.2d 1375, 1389 (4th

Cir.1993) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir.1985)). The Ninth Circuit violated this precept by manufacturing a wholly different claim for plaintiff instead of determining Respondent's ability to articulate the claims he did bring. Moreover, the court erred in making the "lack of legal training" the test for requiring appointed counsel. If that were the test, then trial courts would never have the discretion to deny appointed counsel in any *pro per* civil rights case. Finally, the Ninth Circuit erred in failing to acknowledge that the trial court's discretion was fully supported by Respondent's ability to articulate the claims he brought. Instead, it created its own lawsuit, not surprisingly found it unarticulated, and then chastised the district court for denying counsel based on the record before it rather than on a phantom claim that never existed in the case.

B. Excessive force cases like this one are simply not complex.

The vast majority of excessive force cases like the one presented here are found to be straightforward and thus not deserving of appointed counsel.[5] *See, e.g., King v. Patterson*,

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[5] They are usually not even deserving of a published opinion. *See, e.g., Smith v. Myers*, 2005 WL 525159 (4th Cir. 2005); *Johnson v. Weaver*, 81 Fed. Appx. 841, 2003 WL 22867614 (5th Cir. 2003); *Butler v. Cloud*, 78 Fed. Appx. 374, 2003 WL 22391198 (5th Cir. 2003); *Peoples v. Kimmey*, 67 Fed. Appx. 506, 2003 WL 21143107 (10th Cir. 2003) (excessive force claims are straightforward and the law governing them is settled); *Keller v. Trefz*, 66 Fed.Appx. 44, 2003 WL 1870718 (7th Cir. 2003) (excessive force case factually simple and legally straightforward, presenting no unusual complexity); *Brown v. Kordis*, 46 Fed. Appx. 315, 2002 WL 31055978 (6th Cir. 2002) (excessive force claim had slim chance of success); *Royal v. Doe*, 19 Fed. Appx. 455, 2001 WL 1104467 (8th Cir. 2001) (excessive force claim neither factually nor legally complex); *Stewart v. Simpson*, 15 Fed. Appx. 460, 2001 WL 823873 (9th Cir. 2001) (no exceptional circumstances exist for appointment of counsel for state prisoner in excessive force case); *Rogers v. Scheffer*, 2005 WL 568034 (W.D.Wis. 2005) (excessive force case; law well-established, complaint competently drafted, and plaintiff "is a seasoned litigant," having filed

999 F.2d 351 (8th Cir. 1993) (upholding denial of appointed counsel, noting that case was neither factually nor legally complex, complaint alleged a single incident of excessive force, and plaintiff had clearly communicated his concerns and could adequately present the facts of his case); *Liggins v. Rivas*, 990 F.2d 1258 (9th Cir. 1993) (upholding denial of appointed counsel in excessive force case; plaintiff was working on advanced education; court states that even assuming plaintiff is not well versed in the law and has made serious allegations, case is not exceptional); *Velasquez v. O'Keefe*, 899 F. Supp. 972 (N.D.N.Y.1995) (inmate who brought excessive force action against prison guards not entitled to appointed counsel; dispute over whether prison guards assaulted inmate was not overly complex, and record indicated that inmate had ability to learn and implement legal arguments); *Hall v. City of Philadelphia*, 828 F. Supp. 365 (E.D.Pa. 1993) (plaintiff's ability to handle excessive force claim, together with lack of complexity, negate the need for appointment of counsel).[6]

In light of the foregoing, it is not surprising that the Ninth Circuit could not come up with a real "complexity" to the excessive force claim. In truth, like the cases cited here, the excessive force claim that Respondent brought was simply a

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seven different lawsuits, is experienced in discovery matters, in defending against motions for summary judgment, and familiar with preliminary pretrial conferences and court procedure); *Shaffer v. Brinegar*, 23 Fed. Appx. 580 (7th Cir. 2001) (issues not complex; plaintiff already demonstrated that he understood elements of excessive force claim and was capable of representing himself at trial).

[6] The Ninth Circuit ignored Respondent's retaliation claim in its opinion. The court neither described any complexities associated with it, nor indicated that Respondent was unable to articulate his contentions, nor came forward with any other justification for requiring appointed counsel on this claim. Petitioners have not found a case in the country requiring appointed counsel where plaintiff alleges that he was placed in segregation due to retaliation rather than due to his own defiant behavior.

matter of whom to believe. There were no experts, no complicated medical issues, and no complex medical records. For this reason, the only complexities the court could cite were three manufactured issues that made no substantive difference to the case that was filed.

As is noted above, not one of the three asserted "complexities" existed. Focusing only on the excessive force claim, the court's first offered complexity was that Respondent could have added the United States as a defendant under the Federal Tort Claims Act, and also sued CCA either directly in tort, or as an added defendant to the FTCA claim. (App. 4a-5a). But the United States would not have been a proper defendant on plaintiff's excessive force claim. The federal government had nothing to do with the amount of force CCA's employees used for plaintiff's take-down. And adding CCA as a defendant to this claim would have made no substantive difference whatsoever. The same evidence was proffered and the same jury instructions were given as would have been had CCA been a defendant. The jury simply found no excessive force. Plainly, the addition of the United States or CCA as defendants to this claim was not a "complexity" that required appointment of counsel.

The Ninth Circuit's second "complexity" was that the case against the individual employees should have been brought under *Bivens*, and not under § 1983 as Respondent had cited (App. 5a). But it is completely irrelevant that *Bivens* was the correct jurisdictional basis rather than 42 U.S.C. § 1983. *Bivens* actions and § 1983 actions are analogous; the only difference is that *Bivens* applies to constitutional violations by federal, rather than state officials. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.1996) (Section 1983 and Bivens actions identical except for requirement of state actor under § 1983 and federal actor under *Bivens*). For this very reason, no one raised this technicality below; no one moved to dismiss on this basis; the case went to trial despite plaintiff's reliance on § 1983 instead of *Bivens*; and the jury instructions that were

given were no different than those that would have been given had plaintiff stated the correct jurisdictional basis. Even on appeal, Petitioners simply noted in passing that the correct legal basis for the suit was *Bivens* instead of § 1983. This was certainly not a "complexity" of the case that required appointment of counsel.

The court's third cited complexity was that "an issue existed as to whether the prison's policies requiring restraints when transporting inmates applied to a non-criminal detainee like plaintiff (App. 5a), but plaintiff, who lacks legal training, did not "properly frame" this issue or ask for those policies (App. 5a, 6a). Of course, the propriety of requiring restraints to transport Respondent was not a claim in this case in any way, shape or form. Furthermore, if the court was suggesting that **this** case was complex because it thought Respondent could sue the federal government and CCA on a **different** claim—i.e., for requiring transport restraints for detainees—the court respectfully was wrong. No prison in the nation allows detainees to be transported outside the facility without restraints; and no prison in the nation allows a detainee to direct when a reduced level of restraint will be used. A written doctor's order is required before any inmate can be transported with a reduced level of restraint. Not surprisingly, the Ninth Circuit did not cite any authority showing that Respondent would likely have succeeded on such a claim. In truth, such a challenge to the prison's policy to restrain detainees for transport would have flown in the face of *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (conditions of pretrial detention reasonably related to a legitimate governmental objective are constitutional) and *Turner v. Safley*, 482 U.S. 78, 89 (1987) (jail officials, more experienced in the behavior of inmates, must have the latitude "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). Thus, the court's third cited "complexity" was not a viable justification for requiring appointed counsel.

The panel cited one last "fact" that it said "enhanc[ed] the exceptional character of the case," and that was "the anomaly of incarcerating a person on non-criminal charges and confining him for seven years." (App. 6a). But the length of plaintiff's detainment was never an issue, a claim, or an argument in this lawsuit. In fact, the Ninth Circuit had already ruled in a prior opinion that the length of Respondent's incarceration was constitutional. *Agyeman v. Coachman*, 74 Fed. Appx. 691, 694 (9th Cir. 2003). In that same decision, the court found that it was Respondent himself who had substantially caused the delays with which the court seemed to be so concerned in this case. The length of Respondent's detainment was not an exceptional circumstance that required appointed counsel here.

In summary, while all the circuits acknowledge that a district court's decision on appointment of counsel is "discretionary," the circuits are split on what the federal standard for appointing counsel really is. Is it a broad discretionary approach based on factors that vary circuit to circuit? Or is the district court's discretion limited to appointing counsel only in "exceptional circumstances," which itself has not been conclusively defined? Whichever formulation the Court selects, in no event should an appellate court be able to manufacture a non-existent claim on behalf of an indigent plaintiff, and then reverse the district court for having denied counsel on the claims and record before it, when that record supported the denial of counsel under any circuit's formulation of the standard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 13, 2005

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 6, 2004]

No. 03-16068
D.C. No. CV-99-01366-PGR

EMMANUEL SENYO AGYEMAN,
Plaintiff-Appellant,

v.

CORRECTIONS CORPORATION OF AMERICA; ZURICH INSURANCE COMPANY; GERBER, Assistant Shift Supervisor; VALADEZ, Unit Manager; D. RIVAS, Assistant Warden; LAURENCE, Chief of Security; H. MOHN, Disciplinary Hearing Officer; JOHN GLUCH, Warden; SAMBERG, Warden; SARAH CANNON, Internal Controls Officer; LOPEZ, Shift Supervisor; CALDERON,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
November 1, 2004—San Francisco, California

Before: Betty B. Fletcher, John T. Noonan, and Sidney R. Thomas, *Circuit Judges*.

OPINION

NOONAN, *Circuit Judge*:

Emmanuel Senyo Agyeman appeals the judgment of the district court in this *Bivens* action in favor of the defendant employees of the Corrections Corporation of America. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Holding that the district court abused its discretion in declining to appoint counsel for Agyeman, we vacate the judgment and remand.

PROCEEDINGS

Agyeman, a native of Ghana, entered the United States in 1988. In 1991, he married a United States citizen, Barbara Levy, who subsequently filed an application for adjustment of his status. Barbara Levy, because she was hospitalized, was unable to attend an INS-scheduled interview, and the adjustment was denied. On July 28, 1997, he was found deportable by an immigration judge, and the decision was affirmed by the Board of Immigration appeals. On July 23, 2002, *in Agyeman v. INS*, 296 F.3 d 871 (9th Cir. 2002), from which the foregoing facts are taken, we reversed the Board of Immigration Appeals, holding that Agyeman had not received a full and fair hearing, and remanded.

Meanwhile, on February 4, 1997, prior to the immigration judge's ruling, Agyeman had been detained by the Immigration and Naturalization Service (the INS) and thereafter placed in custody in various correctional institutions, some of them operated by the Corrections Corporation of America (the Corrections Corporation), a private company employed by the federal government. On June 10, 1999, he initiated this litigation in response to the treatment he received from his custodians. On October 25, 1999, Agyernan was allowed to proceed in forma pauperis. In a Screening Order dated that day, the district court pointed out various glaring deficiencies in his complaint. In response, on November 5, 1999, Agye-

man filed his first amended complaint. On February 9, 2000, several of his claims were dismissed by the court without prejudice. His motion to file a second amended complaint was affirmatively recommended by the magistrate judge to whom the case had been assigned, but only after the excision of several claims and defendants. These recommendations were adopted by the district court on January 4, 2001.

Earlier, on November 13, 2000, the magistrate judge had denied without prejudice Agyeman's motion to appoint counsel. The magistrate judge stated: "Plaintiff has failed to show that any difficulty he is experiencing in attempting to litigate this case is derived from the complexity of the issues involved." No constitutional right to counsel was at stake, the magistrate judge ruled, because the "case is beyond the pleading stage."

At the center of Agyeman's case were these allegations:

> On October 11, 1998, Plaintiff, a pretrial detainee, at Corrections Corporation of America, Central Arizona Detention Center in Florence Arizona was beaten by Captain Lopez, the Shift Supervisor, Lt. Egber and a Sgt. "John Doe". Whilst in full mechanical restraints in preparation for being transported to Casa Grande Medical Center in an Emergency the Prison Medical Unit believed was a cardiac arrest, Plaintiff was nonetheless knocked to the floor by Captain Lopez, Lt. Egber and a Sgt. "John Doe" for refusing to comply with an order and wasting their time. Plaintiff barely was conscious.
>
> Plaintiff suffered pain and anguish; three broken teeth; loss of blood and several bruises. Plaintiff suffered torture from being restrained in an unnatural position in a locked cell and fastened to a bed for several hours (At least 12 hours) calculated to inflict pain.

Agyeman's motion to file a third amended complaint was denied.

The case went to trial and after three and one half days, on May 2, 2003, the jury found in favor of the defendants. On June 25, 2003, the district court denied Agyeman's motion for relief under Fed. R. Civ. P. 60(b)(3), his motion for a new trial, and his motion for judgment as a matter of law.

Agyeman appealed in forma pauperis. The district court certified that the appeal was not taken in good faith and revoked this status. A motions panel of this court reviewed the record and ruled that Agyeman was entitled to this status for this appeal. This court also granted Agyeman's motion for appointment of pro bono counsel to represent him.

ANALYSIS

In proceedings in forma pauperis, the district court "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). The decision to appoint such counsel is within "the sound discretion of the trial court and is granted only in exceptional circumstances." *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of the exceptional circumstances of the plaintiff seeking assistance requires at least an evaluation of the likelihood of the plaintiff's success on the merits and an evaluation of the plaintiff's ability to articulate his claims "in light of the complexity of the legal issues involved." *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

Agyeman's case brought against Corrections Corporation and its employees, had a triple complexity. First, to the extent that Agyeman sought to hold Corrections Corporation itself liable, the case could not be brought under *Bivens*, 403 U.S. 388, since Corrections Corporation is a private corporation. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to apply *Bivens* to private corporations). Rather, Agyeman could have brought a suit against the United States under the Federal Tort Claims Act, 28 U.S.C.

§§ 1346(b)(1), 2671-2680; *United States v. Muniz*, 374 U.S. 150 (1963). Alternatively, he could have sued the corporation directly in tort and he could have sought injunctive relief. *See Malesko*, 534 U.S. at 72-74 (discussing alternative options for federal prisoners in private prisons). Agyeman would have had the option of bringing this suit against Corrections Corporation by joining the latter as a defendant in the suit under the Federal Tort Claims Act and requesting the district court to exercise supplemental jurisdiction over this defendant. 28 U.S.C. § 1367; *see* Lester S. Jason & Robert C. Longstreth, *Handling Federal Tort Claims* §§ 6.02-.03 (2004).

Second, to the extent that Agyeman sought recovery from individual employees of the Corrections Corporation, the case had to brought as a *Bivens* action. *Bivens*, 403 U.S. 388. Third, to the extent that Agyeman's status as a person being held on noncriminal charges enhanced his rights beyond those of an ordinary criminal prisoner, an issue was presented whether the standard Bureau of Prison rules governing the transfer of prison inmates were applicable to him.

The district court in its ruling on his second amended complaint did inform Agyeman of the peculiar position of the Corrections Corporation; but the court did not give him the opportunity to use the information. As to the nature of his action against the employees, not only did Agyeman misconceive it to be a section 1983 action against state employees, but neither the magistrate judge nor the district judge caught the error. Only on appeal was it noted by counsel for Corrections Corporation. Finally, at no point did Agyeman gain access to what Corrections Corporation on appeal has argued is the decisive standard for the restraints put on him prior to transfer for treatment of his emergency medical condition: the 16 pages of the Federal Bureau of Prisons' regulations of December 23, 1996, entitled "Escorted Trips," regulations on their face applicable to felons and innocent detainees alike.

Agyeman, it is obvious from his pleadings, is literate and educated. He was able to read statutes and legal literature. But he lacks legal training. As is evident from the record, a lawyer attentive to differences would have noticed that Agyeman should have sued the employees under *Bivens*, and the United States and the corporation under the Federal Tort Claims Act. Instead, he was left to articulate a case where, if he had prevailed before the jury, the defendants would have successfully moved for judgment as a matter of law on the ground that they could not be sued as state actors. Without gaining access to the federal prison regulations, Agyeman could not establish that the treatment he alleged that he received was or was not contrary to what was required by the United States as to noncriminal detainees. Without a lawyer, Agyeman not only did not think of obtaining this information but did not advance any coherent theory for subjecting Corrections Corporation to liability. His case, in short, was complex. The circumstances were exceptional. The magistrate judge who ruled on Agyeman's request for counsel knew very little of the likelihood of his success on a claim that had not been properly framed.

A further fact, enhancing the exceptional character of the case, is the anomaly of incarcerating a person on noncriminal charges and confining him for seven years. Such incarceration may be a cruel necessity of our immigration policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal. Is there any warrant for shackling the feet and binding the chest of an innocent detainee? It requires legal skill to frame this issue and distinguish Agyeman's case from that of the ordinary transferee taken by the Bureau of Prisons on an Escorted Trip.

Because Agyeman was denied counsel, the judgment in his case must be VACATED. The case is REMANDED for proceedings consistent with this opinion, including the appointment of counsel by the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

[Filed Nov 13, 2000]

CV-99-1366-PHX-PGR (JI)

EMMANUEL SENYO AGYEMAN,
Plaintiff(s)

vs

CORRECTIONS CORPORATION OF AMERICA, ET AL.,
Defendant(s)

ORDER RE MOTION TO APPOINT COUNSEL

On August 24, 2000, Plaintiff filed a "Motion to Appoint Counsel" [Dkt 46], seeking appointment of counsel based upon (1) lack of library and other facilities at the Maricopa County Jail, (2) Plaintiff's loss of his legal papers, and (3) his need to depose the opposing parties.

Under the controlling law in the Ninth Circuit, neither the Constitution nor 28 U.S.C. § 1915(d) justify appointment of counsel for Plaintiff.

1. No Constitutional Right to Counsel

There is no constitutional right for an indigent to have appointed counsel in a civil case. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); accord *Randall v. Wyrick*, 642 F.2d 304 (8th Cir. 1981).

2. Constitutional Right of Access to Courts Does Not Require Appointment

Plaintiff is beyond the point in this case where Plaintiffs' "right of access" requires appointment of counsel. It is estab-

lished "beyond doubt" that prisoners have a constitutional right of access to the courts, *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494 (1977), that is "adequate, effective, and meaningful." *Id.* at 822, 97 S.Ct. at 1495.[1]

It is true that the "right of access" can require access to a law library. In *Bounds*, the Court posed the question as "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825, 97 S.Ct. at 1496. The Court noted that if the state files a response to a *pro se* pleading, "it will undoubtedly contain seemingly authoritative citations" and without a library, an inmate will be unable to rebut the state's argument. *Id.* at 826, 97 S.Ct. at 1497. The Court therefore held, "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828, 97 S.Ct. at 1498. However, "[i]nsofar as the right vindicated by *Bounds* is concerned, meaningful access to the courts is the touchstone', and the inmate must therefore demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 2180 (1996) (citations omitted). The Constitution does not require that prisoners be able to "conduct generalized research, but only

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[1] The Plaintiff is not precluded from seeking assistance from fellow inmates. In *Johnson v. Avery*, 89 S.Ct. 747 (1968), the Supreme Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation barring inmates from furnishing such assistance to other prisoners." *Id.* at 751. In *Wolff v. McDonnell*, 94 S.Ct 2963, 2985-88 (1974), this holding was unanimously extended to cover assistance in civil rights actions.

that they be able to present their grievances to the courts." *Id.* at 360, 116 S.Ct. at 2184.

The Ninth Circuit has held that the constitutional right of access to the courts requires that the state provide assistance only through the pleading stage, including preparation of a reply to an answer, if the court orders a reply. *Cornett v. Donovan*, 51 F.3d 894, 899 (1995). This case is beyond the pleading stage and accordingly Plaintiff's right of access is not at issue.

3. Limited Discretion to Appoint Counsel under 28 U.S.C. § 1915(d)

28 U.S.C. § 1915(d) confers on the court the discretion to appoint counsel to represent an indigent civil litigant. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Aldabe*, 616 F.2d at 1093; but this circuit has limited the exercise of that power to "exceptional circumstances", based upon such factors as the likelihood of success on the merits and the ability of the plaintiff to articulate his claims in light of their complexity. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990). Neither of these factors is dispositive and both must be viewed together before reaching a decision on a request for counsel under section 1915(d). *Wilborn*, 789 F.2d at 1331.

Likelihood of Success: Here, Plaintiff has not yet demonstrated a likelihood of success on the merits.

Complexity: In addition, Plaintiff has failed to show that any difficulty he is experiencing in attempting to litigate this case is derived from the complexity of the issues involved. While most actions, such as the instant case, require development of supporting facts during litigation and a pro se litigant will seldom be in a position to investigate easily the facts to support the case, it should be noted that a demonstration of the need to develop the facts to support a case is not sufficient

to establish successfully the complexity of the relevant issues. *Id.*

The grounds cited by Plaintiff do not alter this conclusion. As to Plaintiff's complaint on the lack of law library facilities at the Maricopa County Jail, the Court notes that Plaintiff has apparently been relocated to an I.N.S. facility in Florence, Arizona. As to the loss of Plaintiff's legal papers, the Court is addressing this issue by separate order on Plaintiffs "Motion to Return Legal Papers" [Dkt 47]. Finally, as to the desire to depose opposing parties, the Court notes that the order filed April 21, 2000 [Dkt 24], precludes Plaintiff from deposing a party without leave of the court. Even if Plaintiff seeks and obtains leave to take such depositions, such depositions would not be of such an extraordinary or complex nature as to justify a departure from the principles expressed in Wilborn, *supra*.

IT IS THEREFORE ORDERED that Plaintiff's "Motion to Appoint Counsel" [Dkt 46] is denied without prejudice.

DATED: November 7, 2000

/s/ JAY R. IRWIN
Jay R. Irwin
United State Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 13, 2005]

No. 03-16068
D.C. No. CV-99-01366-PGR
District of Arizona, Phoenix

EMMANUEL SENYO AGYEMAN,
Plaintiff-Appellant,

v.

CORRECTIONS CORPORATION OF AMERICA; *et al.*,
Defendants-Appellees.

ORDER

Before: B. FLETCHER, NOONAN, and THOMAS, *Circuit Judges.*

Judge Thomas has voted to deny petition for rehearing en banc and Judges Fletcher and Noonan recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

(2)

Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-1397

IN THE

Supreme Court of the United States

EDWARD GERBER, JESSE VALADEZ, and FRED LAWRENCE,

Petitioners,

v.

EMMANUEL SENYO AGYEMAN,

Respondent.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a split in the circuit courts regarding the appointment of counsel to indigent litigants under 28 U.S.C. § 1915(e)(1) where every circuit applies a discretionary, case-by-case analysis of whether an attorney should be appointed to guarantee a litigant meaningful access to the courts?

2. Whether the United States Court of Appeals for the Ninth Circuit properly held that Respondent, an indigent civil detainee, should have been appointed counsel pursuant to 28 U.S.C. § 1915(e)(1) in light of Respondent's exceptional circumstances and the complexity of his case?

PARTIES TO THE PROCEEDING IN THE NINTH CIRCUIT

Respondent Emmanuel Agyeman was a non-criminal detainee of the Immigration and Naturalization Service ("INS") held primarily at the Eloy Detention Center in Arizona, which is owned and operated by the Corrections Corporation of America ("CCA"). Respondent brought a civil action against Petitioners and other Defendant-Appellees claiming excessive force and imposition of retaliatory segregation. Respondent repeatedly requested the appointment of counsel under 28 U.S.C. § 1915(e)(1) and was denied by the district court.

Petitioners are prison guards and wardens employed by the CCA who were three of the individually named defendants in Respondent's action for excessive force and retaliation.

Additional Defendants-Appellees in the proceedings below, not represented on brief by Petitioners, include the Corrections Corporation of America, Zurich Insurance Company and several other individual prison guards and wardens employed by the CCA.

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IN THE

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Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION AND JUDGMENT BELOW

The unpublished order of the district court appears at Appendix 7a-10a to Petitioners' Brief. ("Pet. Br." or "Pet. App."). The opinion of the court of appeals (Pet. App. 1a-6a) is available at 390 F.3d 1101 (9th Cir. 2004).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on December 6, 2004. A timely petition for rehearing was denied by the Court of Appeals on January 13, 2005. (Pet. App. 11a). The Petition for a Writ of Certiorari was docketed with the Court on April 20, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE AT ISSUE

28 U.S.C. § 1915(e)(1) provides that in any proceedings in forma pauperis, "[t]he court may request an attorney to represent any person unable to afford counsel."

INTRODUCTION

This case does not merit a grant of certiorari. There is no split between circuits on the issue of appointment of counsel, as every court in every circuit conducts a discretionary analysis, weighing a litigant's particular circumstances to determine whether an attorney should be appointed to ensure meaningful access to the courts. The *Agyeman* opinion is well supported by the unique circumstances at issue, and is fully consistent with the law of the Ninth and every other circuit.

Respondent here was a non-criminal detainee with no meaningful access to a law library and pursuing a complex lawsuit that hinged largely on credibility issues. The Ninth Circuit found that, given Respondent's exceptional circumstances, the district court had abused its discretion by denying the appointment of counsel. The holding is confined to an unusual set of facts, and does not present any concerns, as Petitioner suggests, that counsel will now be required in all prisoner lawsuits. For these reasons and the reasons discussed below, the petition for a writ of certiorari should be denied.

COUNTER STATEMENT OF THE CASE

As the Ninth Circuit's opinion made clear, the facts surrounding Respondent Emmanuel Senyo Agyeman's ("Agyeman" or "Respondent") detention and segregation were indeed extraordinary. Agyeman is an immigrant from Ghana

who entered the United States in 1988 and married a U.S. citizen in 1991. In early 1997, Agyeman and his wife were asked to appear for an interview with the Immigration and Naturalization Service ("INS") to ascertain whether their marriage was a *bona fide* one. Because his wife was hospitalized, she was unable to attend the interview, and Agyeman was placed in custody pending the resolution of his visa status.[1] Thus began Respondent's long and beleaguered journey through the American detention and civil justice system.

It should be noted that Petitioners have misleadingly suggested in their Petition that Agyeman was incarcerated as a result of a DUI, or for passing a bad check. (Pet. Br. at 6). This is not the case; Respondent was a civil detainee. His detention related solely to his immigration status, not to any actual or alleged crime. Petitioners have further confused the issue, suggesting that Respondent was not truly innocent because of his alleged use of profanity in his dealings with prison personnel. Petitioners' litany of alleged expletives has no bearing whatsoever on Agyeman's status as a non-criminal detainee—he was not incarcerated for using dirty words.

Respondent spent seven years in custody while his immigration status was litigated. The majority of this time was spent in various prisons operated by Petitioners' employer and co-defendant, the Corrections Corporation of America ("CCA"), a private company employed by the federal government. His time in detention was largely spent in "disciplinary segregation," principally because CCA personnel claimed he was "insolent." Respondent contests Petitioners' version of certain incidents that Petitioner claims justified the placement of Respondent in segregation. For instance, Petitioners claim he "urinated through his cell door," whereas Respondent contends that his toilet clogged and overflowed

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[1] Agyeman's wife subsequently died, leaving Agyeman's visa status unsettled.

through his cell door. In other instances, Respondent contends that he did not make the statements that Petitioners claim.

While Respondent was a *civil* detainee, one would not know it from the conditions of his incarceration. His custodians evidently drew no distinction between civil and criminal prisoners. While not even charged with a crime, Agyeman was placed in the same facilities and was subject to the same regulations and treatment as if he had been a convicted killer. In fact, in disciplinary segregation, the treatment is much closer to what one would expect to be afforded to the most dangerous of criminals than to an innocent man being held for an expired visa. Respondent was kept in solitary confinement, shackled in leg irons and chest chains, and contends he was subjected to physical abuse by guards.

On October 11, 1998, the prison medical personnel at CCA's Central Arizona Detention Center believed that Respondent was experiencing a heart attack, and he was placed in restraints for transport to a medical center. While being transported, he contends he was knocked to the floor by guards for refusing to comply with an order, resulting in several of his teeth being knocked out. In response, Respondent initiated this litigation. He made his first of three requests for the appointment of an attorney at the outset, but his request was denied by the district court.[2]

Agyeman faced overwhelming obstacles in bringing his case. Petitioners state that he filed "many, many pleadings," but the proliferation of pleadings in this case was hardly due to Respondent's legal expertise, as Petitioners suggest. On the contrary, it was Agyeman's failure to understand the legal

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[2] Petitioners misstate the record by claiming that Respondent only asked for counsel once before trial. In all, he made three requests for such appointment—twice in written motions and once in court.

requirements he faced in pleading and bringing his case that led to such numerous filings. It took Plaintiff almost two years of filing motions and amended complaints before he finally submitted a Complaint that was acceptable to the district court, and even then four of his six original counts were dismissed on the pleadings.[3] This Complaint was still critically flawed; as the Ninth Circuit noted, Agyeman mistakenly brought his case against the prison employees under 42 U.S.C. § 1983 when it should have been a *Bivens* action. Petitioners do not deny that had Respondent actually prevailed at trial, they could have moved to set aside the verdict based on this error.

Respondent was further hamstrung by his placement in disciplinary segregation. Petitioners note that Respondent had no access to a law library during his detention at the Maricopa County Jail, but they misleadingly suggest that this problem was eliminated once he was transferred to a prison that did have a library. That is not the case—there may have been a library on site, but Agyeman could not access it. Petitioners neglect to mention that prisoners held in disciplinary segregation must ask for a case or statute specifically, by citation and case name.[4] Only then would a

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[3] Petitioners again dramatically overstate Respondent's legal prowess, suggesting that because he has been a party to eighteen legal proceedings, he is well versed in the law. In fact, the opposite is true. Most of these lawsuits result from Respondent's inability to ascertain how, where, and against whom to assert this case. In his confusion in bringing the instant lawsuit, he filed the same Complaint many times, often in the wrong courts and/or against the wrong parties, and each time it was docketed as a new case. The extraneous filings were eventually dismissed.

[4] *Casey v. Lewis*, 834 F. Supp. 1553, 1556-1557 (D. Ariz. 1992), *injunction rev'd on other grounds, Lewis v. Casey*, 518 U.S. 343 (1996) (noting that prisoners in Arizona prisons, including the Florence Arizona prison in which Agyeman was detained, have no physical access to a law library and are denied law books unless they can provide an exact citation).

particular case or statute be photocopied and given to Agyeman. There are few, if any legal scholars alive that could effectively conduct legal research given these limitations—this is not meaningful access to a law library.

Agyeman faced a host of other impediments, causing him to renew his plea for counsel in a motion on August 24, 2000. He was again denied. In the course of the five year delay between the incident and trial, and moves from one prison to another, many of his legal papers disappeared. He was not permitted to take depositions "because of the logistical problems involved." He was not only unrepresented at his own deposition, he was given no opportunity to submit errata.[5] With no phone, money or internet access, he was effectively prevented from conducting any legal or factual research, and from locating key witnesses. Thus, Respondent was at an insurmountable disadvantage before trial had even begun.

At trial, the scales were tipped still more dramatically against Respondent. He made a third and final plea for appointment of counsel at the outset of trial, but was again denied. Agyeman was thus left to try the case unassisted against opponents represented by "one of the most experienced litigation firms in Arizona [with] unmatched trial and appellate experience."[6] Forced to present his case in an orange jumpsuit, having had no opportunity to conduct discovery and with no legal training, the trial was a losing proposition from the beginning. Respondent made no opening statement, gave no direct testimony, made no evidentiary objections, and, as the Ninth Circuit opinion points out, argued the entire case under the wrong theory of liability.

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[5] Agyeman contends that the court reporter erroneously recorded in his deposition transcript that Agyeman had had "a whole bunch of DUIs." Agyeman had no opportunity to correct this, and this purported testimony was presented by the CCA at trial, with undoubtedly prejudicial effect.

[6] Jones Skelton Hochuli, *http://www.jshfirm.com/* "Welcome," Accessed May 9, 2005.

As could be expected under the circumstances, the CCA and its personnel prevailed. After four days of testimony from which two critical witnesses were absent, the jury rendered a verdict in favor of the defendants on all counts. The appeal and the Ninth Circuit decision followed. The Ninth Circuit, in vacating and remanding, recognized that this case represented extraordinary circumstances meriting the appointment of counsel.

SUMMARY OF THE ARGUMENT

Petitioners have not presented any issue appropriate for review under the Supreme Court's Rules. Supreme Court Rule 10 sets forth the circumstances in which the grant of a petition for a writ of certiorari may be appropriate:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Sup. Ct. R. 10(a).

First, as discussed below, the Ninth Circuit's decision in this case does not conflict with the opinion of any other circuit court. (Also, there is no state court decision involved here, and Petitioners do not allege any conflict with a decision of this Court.) Second, there is no important federal question which must be resolved by the Court. The reach of the Ninth Circuit holding is extremely limited due to the unusual facts of Respondent's case, and there are not sufficiently broad precedential implications to merit this Court's attention. Finally, the Ninth Circuit did not depart from the accepted and usual course of judicial proceedings so

as to warrant review by this Court. The Ninth Circuit applied its customary "exceptional circumstances" test and concluded that Respondent's case did in fact present exceptional circumstances. This conclusion is hardly shocking in a legally complex case in which a non-criminal detainee has been incarcerated for seven years by a variety of government and private entities, had his teeth knocked out by guards while suffering from a heart attack, and was shackled in punitive segregation with no meaningful access to a law library.

For all of these reasons, as well as those set forth below, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT *AGYEMAN* OPINION IS NOT IN CONFLICT WITH ANY OTHER U.S. COURT OF APPEALS ON AN IMPORTANT MATTER

Petitioners complain that different circuits have adopted different factors to be considered when deciding whether to appoint counsel, pleading for "guidance and a firm understanding of a uniform standard" to apply in appointment to counsel cases. Upon closer analysis, however, the differences between the circuits' approaches are trivial at best. The authorities Petitioners cite for the purported "split" are easily reconcilable and reveal that the multi-factor test of the Second, Third, and Seventh Circuits is fundamentally consistent with, and applies the same legal principles as the "exceptional circumstances" test adopted by the Ninth Circuit. While the number of factors and the precise language may vary slightly, all circuits addressing the question of appointment of counsel under 28 U.S.C. § 1915(e)(1) have applied a discretionary analysis aimed at determining an indigent plaintiff's ability to litigate without representation. Imposing a blanket checklist of factors on district courts

evaluating an indigent plaintiff's request for appointment of counsel is unnecessary and impractical.[7]

Nor does the *Agyeman* decision itself illustrate or create a split in the circuits with respect to the appointment of counsel test. Petitioners fail to cite any case involving similar legal and factual issues in which another circuit court affirmed the denial or reversed the appointment of counsel. (Pet. Br. at 14). Contrary to Petitioners' assertions, applying the elements of any circuit's multi-factorial approach to the particular circumstances of Agyeman's detention and the legal and factual complexity of his claims, Agyeman would easily qualify for appointment of counsel. Thus, even if some variation exists among the circuits' approaches to this issue, this particular case is not the appropriate vehicle for resolving such split because it is not in conflict with any decision of another circuit court.

A. There is no Genuine "Split"—All Circuits Apply Consistent Legal Principles When Evaluating Requests for Counsel

The right of access to the courts is a fundamental constitutional right, and fully implementing this right requires that the access granted be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). Indeed, "meaningful access" is the touchstone for assuring that an indigent litigant has an adequate opportunity to

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[7] Indeed, this Court has already twice denied petitions for certiorari in cases addressing the purportedly conflicting "extraordinary circumstances" test and the Third and Seventh Circuit's multi-factor approach. *Compare Tabron v. Grace*, 6 F.3d 147 (3rd Cir. 1993) (rejecting substantive restrictions that may be imposed district courts' discretion under in favor of multi-factor approach to requests for counsel under 28 U.S.C. § 1915), *cert. denied*, 510 U.S. 1196 (1994); *with Farmer v. Haas*, 990 F.2d 319, 321-322 (7th Cir. 1993) (framing Seventh Circuit's multi-factorial approach in terms of the simpler formation of the Ninth Circuit's "exceptional circumstances" test), *cert denied*, 510 U.S. 963 (1993).

present his claims fairly, and is at the heart of the appointment of counsel analysis under 28 U.S.C. § 1915(e)(1). *See Bounds* at 823; *Hodge v. Police Officers*, 802 F.2d 58, 60 (2nd Cir. 1986) ("Of course, [§ 1915(e)(1)] must be understood to guarantee indigents 'meaningful access' to the courts as required by the Constitution.") (citing *Bounds*, 430 U.S. at 823). While the *Hodge* court acknowledged that "meaningful access" does not always mean granting an indigent plaintiff counsel in civil cases, *id*, in certain situations appointment of counsel is necessary to ensure that an indigent plaintiff can prosecute his claims in an effective and fair manner. *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1983) (prisoner has a constitutional right to appointment of counsel where the denial of proper representation would result in fundamental unfairness impinging upon prisoner's due process rights); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984), *abrogated on other grounds, Mallard v. U.S. Dist. Court for S.D. Iowa*, 490 U.S. 296 (1989) (reversing denial of request for counsel on basis that it "denied litigant a fundamentally fair trial"); *Merritt v. Faulkner*, 697 F.2d 761, 764 (7th Cir. 1983) ("the circumstances of a particular case may make the presence of counsel necessary").

While Petitioners have fastened upon narrow semantic differences in how different circuits formulate the test, it is clear that all circuits are guided by the constitutional underpinnings of the statute and take a fundamentally consistent approach to assessing requests for counsel under § 1915(e)(1). The mere fact that some chose a simple formulation, while others delineate more fully the individual elements that weigh in the analysis, does not warrant this Court's intervention. Ultimately, the same legal principles guide every district court's discretionary assessment of an indigent litigant's circumstances: whether, based on the particular facts at hand, denial of counsel would impinge the due process rights of the indigent plaintiff. This case-by-case analysis is tailored to address the reality that unique,

differently situated litigants present different due process concerns. *Accord, Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981) ("the decision must rest upon the court's careful consideration of all the circumstances of the case, with particular emphasis upon certain factors that have been recognized as highly relevant to a request for counsel"); *DesRosiers v. Moran*, 949 F.2d 15, 24 (1st Cir. 1991) ("to determine whether there are exceptional circumstances . . . a court must examine the total situation. . .").

A close look at the particular rules and factors applied in different circuits underscores that they are all essentially the same.[8] The first factor to consider in any circuit is the merits of the indigent plaintiff's claim. The Ninth Circuit characterizes this as requiring "at least an evaluation of the likelihood of plaintiff's success on the merits." *Agyeman v. Corrections Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). This is no different than the requirement in other circuits that the plaintiff make a threshold showing that the claim "has some merit in fact and law." *See Maclin*, 650 F.2d at 887; *Hodge*, 802 F.2d at 60; *Tabron v. Grace*, 6 F.3d 147, 155 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994)

Following an assessment of the merits, every circuit requires district courts to balance the complexity of the indigent plaintiff's case against his ability to represent himself. The criteria evaluated under the multi-factor test include: the plaintiff's ability to investigate the facts, including the extent to which confinement may pose problems; the type of evidence to be presented to the fact finder, favoring appointment of counsel where evidence consists of conflicting testimony and will turn on credibility and hence

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[8] The core similarity of the exceptional circumstances and multi-factor approaches is highlighted by the fact that, as Petitioners note, both the First and Fifth Circuit apply the multi-factor test and call it an "exceptional circumstances" test. *See, e.g., Cookish v. Cunningham*, 787 F.2d 1, 3 (1st Cir. 1986), (Pet. Br. at 16).

the need for effective cross-examination; the plaintiff's ability to represent himself; the difficulty and complexity of legal issues presented; and "any special reason why appointment of counsel would be more likely to lead to a just determination." *See, e.g., Hodge*, 802 F.2d at 60-62 (adopting *Maclin* factors); *Tabron* 6 F.3d at 155-56; *McCarthy v. Weinberg*, 753 F.2d 836, 838-40 (10th Cir. 1985).

Circuits adopting the exceptional circumstances test simply direct district courts to evaluate "the plaintiff's ability to articulate his claims 'in light of the complexity of the legal issues involved.'" *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). However, this second prong of the exceptional circumstances test is clearly just a simpler formulation of the various "additional" factors considered in other circuits, and it is easily construed as encompassing *all* of these individual elements. As Judge Posner has noted, the "other" *Maclin* factors "collapse upon inspection," and the inquiry is essentially whether, given the difficulty of the case, the plaintiff appeared competent to try it himself effectively. *Farmer v. Haas*, 990 F.2d 319, 321-22 (7th Cir. 1993), *cert denied*, 510 U.S. 963 (1993). *See also Whisenant*, 739 F.2d at 163 ("No comprehensive definition of exceptional circumstances is practical. The existence of such circumstances will turn on the quality of two basic factors—the type and complexity of the case, and the abilities of the individuals bringing it.") (quoting *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982)).

Petitioners' characterization of the factors applied in different circuits as "completely different" is preposterous. It is clear from Petitioners' brief itself that the factors are in fact closely-aligned. Indeed, *all* of the cases Petitioners name as exemplifying non-uniform factors cite to, and adopt factors from the seminal *Maclin* decision. This common origin underscores that the factors are indistinguishable in prin-

ciple.[9] Moreover, the *Maclin* court acknowledged that the factors it articulated do not constitute an "exclusive checklist," but rather are elements often found to be significant in the appointment of counsel analysis. *Maclin*, 650 F.2d at 889; *Lockert v. Faulkner*, 574 F. Supp. 606, 608 (N.D. Ind. 1983) (standards for evaluating requests for counsel include, but are not limited to, the commonly cited *Maclin* factors). Thus, one would expect some case-to-case variation in a court's formulation of the factors, focusing on those most relevant to the case at hand.

Finally, it must be noted that Petitioners mischaracterize the Second, Third, and Seventh Circuit tests as affording broader discretion to trial courts considering requests for counsel than courts in other circuits. (Pet. Br. at 13, 15-18).[10] *See also Maclin*, 650 F.2d at 886 (noting that district courts have "broad discretion" to appoint counsel under § 1915(e)(1)). District courts in the Ninth Circuit are given "considerable discretion" in determining whether counsel is necessary. *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 800. How this differs from "broad discretion" eludes the Respondent. Moreover, while grants of a motion for counsel and reversals of those denials are rare, *id.*, neither "con-

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[9] The one exception is *Poindexter v. F.B.I.*, 737 F.2d 1173 (D.C. Cir. 1984), which is unsurprising considering that case analyzed appointment of counsel under 42 U.S.C. § 2000e-5(f)(1) (Title VII), not 28 U.S.C. § 1915(e)(1).

[10] One of the cases Petitioners cite regarding the analysis employed in the Fifth Circuit, like *Poindexter*, does not even discuss 28 U.S.C. § 1915(e)(1). Indeed, Petitioners' do not stop here at erroneously citing authorities that do not actually offer any support for their legal propositions. For example, Petitioners cite *Castillo v. Cook Cty Mail Room Dep't*, 990 F.2d 304 (7th Cir. 1993), as holding that the "trial court erred in failing to *sua sponte* appoint counsel for indigent inmate." (Pet. Br. at 20). The court in fact held only that the trial court erred in *dismissing the plaintiff's claim* and failing to grant him in forma pauperis status, and instructed the trial court to appoint counsel upon remand.

siderable" nor "broad" discretion is absolute. "To say that a district court may exercise discretion is not to say that such discretion is unreviewable." *Maclin*, 650 F.2d at 886 (quoting *Ekanem v. Health & Hospital Corp. of Marion County*, 589 F.2d 316, 319 (7th Cir. 1978)); *see also Hodge*, 802 F.2d at 60 (though broad discretion lies with district court judge, this "does not mean that a court can do whatever it pleases"). In fact, *Agyeman* does not demonstrate a split in the amount of discretion afforded the trial courts. The case just confirms that a district court's failure to consider the indigent plaintiff's unique circumstances, and whether denial of counsel would deny him meaningful access to the courts, does not amount to the exercise of sound discretion under the § 1915(e)(1) analysis.

While Petitioners plead for a "uniform standard" regarding the appointment of counsel, greater uniformity hardly seems desirable. A rigid standard would inevitably detract from the ability of courts to assess and respond to unique circumstances, thereby diminishing the extent to which due process concerns are effectively addressed. For example, Petitioners suggest that the appointment of counsel is never appropriate where a litigant is literate, educated and articulate, regardless of the complexities of the case and other impeding factors. (Pet. Br. at 20). The imposition of such a blanket rule would foreseeably lead to many situations in which litigants are wrongly denied counsel, seriously undermining the core due process objectives underlying the statute.

B. *Agyeman* is Not in Conflict with the Decision of Any Circuit Court

Petitioners present a long string of completely inapposite cases to support the proposition that, for a literate litigant such as Respondent, "every other circuit in the nation would likely have found the denial of counsel to be well within the trial court's discretion." (Pet. Br. at 20). These cases

show nothing of the kind—in fact not one of the Petitioners' cited cases demonstrates any inconsistency with *Agyeman* whatsoever.

First, every case Petitioners cite pertains to a criminal prisoner, thus invoking none of the special concerns arising from Agyeman's civil status that were pivotal to the Ninth Circuit's holding. Second, not one of the cases cited addresses the particular legal complexities at issue, such as the need to comprehend and successfully navigate *Bivens* actions rather than 42 U.S.C. § 1983, the Federal Tort Claims Act and state causes of action. These factors are absent from Petitioners' cited cases but were discussed at length by the Ninth Circuit as a basis for its conclusion in Respondent's case. Third, many of the cases Petitioners cite specifically list as a justification for the denial of counsel the absence of disputed facts and the fact that credibility would not play a major role in the case. *See Cookish v. Cunningham*, 787 F.2d 1, 3-4 (1st Cir. 1986) (facts straightforward and mostly undisputed); *Childs* 705 F.2d at 922-923 (most facts undisputed); *Hill v. Davidon*, 844 F. Supp. 237, 238 (E.D. Pa. 1994) (denying counsel where credibility would not be a large factor in outcome of case); *Davidson v. Goord*, 259 F. Supp. 2d 238, 239 (W.D.N.Y. 2003) (no difficult factual issues). Such cases stand in stark contrast to *Agyeman*, where every determinative fact was hotly contested and the outcome turned on credibility and the ability to conduct effective discovery and cross-examination. Finally, none of the cases Petitioners cite involved a litigant so consistently deprived of access to legal resources. Indeed, several cases rely on the litigant's access to a law library as one factor supporting denial of counsel; but unlike the litigants in those cases, Respondent could not go to the prison library for most of his seven years behind bars. *Cf id.*, at 239 (finding plaintiff could advance § 1983 arguments *based on* reasonable access to prison law library); *Hill*, 844 F. Supp. at 238 (plaintiff's ability to use library upon request supported denial of

counsel). In short, it is absurd for Petitioners to hypothesize that because various courts have upheld the denial of counsel for criminal litigants on completely different facts, "every circuit in the nation" would find that Respondent was not entitled to counsel.

On the contrary, under the factors courts in different circuits consider in the § 1915(e)(1) analysis, Respondent presents a strong case for the appointment of counsel in any court in the nation, even under the purportedly conflicting multi-factor tests of the Second, Third, and Seventh Circuits.

First, Agyeman has met the threshold requirement that his claims have "merit in fact and law." He alleged that prison guards subjected him to excessive force, knocking out several of his teeth, and that he was wrongfully placed in segregation in retaliation for bringing a civil lawsuit against the prison guards. These are colorable claims, as demonstrated by the fact that he was able to bring his case to trial. *Maclin*, 650 F.2d at 887. Indeed, the principal factors militating against his "likelihood of success" all trace directly to his lack of a lawyer: his failure to frame his case properly and his inability to conduct discovery or to effectively cross-examine his well-represented opponents in a battle of credibility.

The remaining "additional" factors similarly weigh in favor of appointing counsel. For example, the Second Circuit will consider the indigent's ability to investigate and present crucial facts, in light of the nature of the factual issues involved and whether the case is "fact intensive." *See Hendricks*, 114 F.3d at 392, 394; *Hodge*, 802 F.2d at 60. *See also Tabron*, 6 F.3d at 156 (analogous factor in Third Circuit is "the ability of the plaintiff to investigate his case," which encompasses the extent of discovery required, complexity of discovery rules, and whether the conditions of the prisoner's confinement disadvantaged him in discovery). Respondent comfortably falls within the ambit of this factor. He was trapped in solitary confinement with no ability to depose

witnesses, conduct discovery, or otherwise investigate the facts necessary to support his case. *Maclin* 650 F.2d at 887 ("Where the indigent is in no position to investigate crucial facts, counsel should often be appointed.")

Another factor weighing in favor of appointing counsel is if "conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder." *Hodge*, 802 F.2d at 61; *Tabron*, 6 F.3d at 156 (analogous factor in Third Circuit is whether the case is likely to turn on credibility determinations); *Maclin* 650 F.2d 888 ("Counsel may also be warranted where the only evidence presented to the fact finder consists of conflicting testimony.") In the case at hand, the evidence consisted almost entirely of conflicting testimony regarding the circumstances of the assault upon Respondent, as well as the reasons for his placement in segregation. Virtually every fact relating to the central claims was contested, pitting Respondent's version of events against that of the guards. Given that this case turned largely on issues of credibility, effective cross-examination by an advocate—and one not wearing an orange jumpsuit—was essential.[11] This factor, however formulated, is easily satisfied.

The last factor generally considered in the Second, Third, and Seventh Circuits is "the complexity of the legal issues raised by the complaint." *Id.*; *Hodge*, 802 F.2d at 61 (court "should be more inclined to appoint counsel if the legal issues

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[11] It is interesting to note, for example, that the guards' reports for the particular incident underlying Respondent's lawsuit contained strange similarities that cause the reader to question whether the reports were prepared independently. Each officer speaks of Agyeman's 'combativeness' and his need for 'soft restraints' and the pressure applied to Agyeman's 'mandibular area.' These similarities are inferential evidence of collusion among the guards against Agyeman, and when presented by a skilled attorney during cross-examination, could have powerfully undermined the defendants' credibility.

presented are complex"); *Tabron*, 6 F.3d at 156 (in conjunction with plaintiff's capacity to present his case, court must consider "the difficulty of the particular legal issues"). The Ninth Circuit conducted an extensive analysis of this point in *Agyeman* and concluded that Respondent's case did present the requisite complexity. Petitioners take issue with their conclusion on this point, but as no other circuit has addressed a case with comparable circumstances, Petitioners can rely on nothing but rank speculation that other circuits would disagree with the Ninth Circuit's finding of complexity here.

Thus, even assuming *arguendo* that the circuits genuinely split on the standard when considering a request for counsel, *Agyeman* does not present the appropriate vehicle for resolving such split because it fully accords with the multi-factorial approach of the Second, Third, and Seventh Circuits. Petitioners' claim that any other circuit would have been "hard pressed" to reverse denial of counsel in this case is wholly unsupported. (Pet. Br. at 17). Rather, Respondent faced a confluence of factual and legal complexities that rendered him unable to effectively articulate his claims, making appointment of counsel necessary under any articulated standard. Under the totality of the circumstances, "denial of the appointment of counsel clearly resulted in a trial which was fundamentally unfair." *McCarthy*, 753 F.2d at 839-40.

C. *Agyeman* is Confined to its Facts and Does Not Present an Important Federal Question

The *Agyeman* opinion addresses a unique situation and is very unlikely to impact the interests of the public at large. This Court has held that "special and important reasons" sufficient to justify a grant of certiorari "imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955). Further, this Court has stated that certiorari should not be

granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." *Id.* at 79. By this standard, *Agyeman* does not present special or important reasons for Supreme Court review.

Petitioners claim that in light of the Ninth Circuit's *Agyeman* opinion "trial courts no longer have any discretion"—because all *pro se* litigants lack legal training, "counsel would have to be appointed in every case." (Pet. Br. at 14). Petitioners have grossly miscast the opinion. It does not open a Pandora's Box of litigious prisoners all now entitled to counsel, but rather addresses one man's right to representation in light of a particularly complex, egregious, and likely very rare, fact scenario. When the circumstances at issue are examined, it is apparent that at most a handful of cases could fall within the scope of this opinion.

First, Respondent was a civil detainee. He was not imprisoned as a result of any actual or alleged crime, but rather was "detained" pending the resolution of his visa status, a purely civil matter. Because his non-criminal status was a major factor rendering appointment of counsel appropriate, the precedential scope of this case is quite limited. *Agyeman*, 390 F.3d at 1104 (noting that Agyemen's status as a noncriminal detainee "enhanced his rights" beyond those of an ordinary criminal prisoner). This holding does not control cases in which a *criminal* prisoner is seeking appointment of counsel, which comprise the vast majority of prisoner litigation. Second, the Ninth Circuit's holding is further confined to the unique legal complexities of Agyeman's case, which are described at length in the opinion. Respondent was forced to navigate unassisted through a morass of state and federal law: Section 1983, *Bivens* actions, the Federal Tort Claims Act, state tort actions—all to be construed in light of the standard of treatment for non-criminal detainees. Finally, Respondent was uniquely ham-

pered in bringing his lawsuit by his placement in segregated detention, where he had no access to the basic legal resources necessary to pursue his case. This is another significant factor distinguishing Agyeman's case from that of ordinary prisoners who do have access to a prison law library.

In short, the Ninth Circuit opinion is based upon a fact pattern that is, one hopes, extremely unusual—a man never convicted of a crime, imprisoned for seven years, barred from visiting the prison law library, provided no opportunity to conduct adequate discovery, yet attempting to prosecute a highly complex case against multiple defendants without the assistance of counsel. The number of civil detainees in circumstances comparable to Agyeman's cannot be so great that, even if all were appointed counsel for such cases, there would be any perceptible impact on court resources. Petitioners have offered no evidence of a proliferation of such litigants. Until it appears that this is more than a rare occurrence, Petitioners have not articulated an important federal question that merits this Court's attention.

While Petitioners argue that appointment of counsel for litigants such as Agyeman "will likely" drain courts of resources, it is clearly not a burden on courts that Petitioners fear.[12] They seek rather to avoid legal defense costs and liability for their own treatment of detainees. Without having to face a represented opponent, Petitioners have a preponderous advantage in their dealings with indigent civil

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[12] It is at least as probable that appointment of counsel would relieve courts of the burden of processing certain complex cases such as this one brought by untrained indigent litigants. For example, here, appointment of counsel would have spared the district court two years of reviewing and dismissing numerous inexpertly drafted versions of Agyeman's Complaint. *See e.g. Hendricks*, 114 F.3d at 393 (where a pro se litigant faces substantial problems developing the record in the face of complex issues, the appointment of counsel serves the interests of the court as well as the litigant).

detainees such as Agyeman. There is virtually no danger of liability for any offenses committed by prison personnel where an indigent plaintiff such as Respondent must proceed with no ability to investigate facts, no ability to conduct legal research and no attorney. While Petitioners understandably seek to preserve their advantage, insulating private prisons from liability for the mistreatment of civil detainees is not an important federal matter worthy of a grant of Certiorari.

II. THE NINTH CIRCUIT'S DECISION WAS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioners' dissatisfaction with the result notwithstanding, the Ninth Circuit did in fact adhere to the well-articulated standard for appointment of counsel that has guided courts in the Ninth Circuit for some time. As discussed above, while this standard is expressed somewhat differently, it is fundamentally consistent with the standards adopted by other circuits addressing the issue.

Petitioners first create a new standard that is not and never has been the law in any circuit: that district courts may always deny the appointment of counsel if the litigant is literate and does not suffer from some physical or mental impairment. (Pet. Br. at 19-20). Petitioners then attack the Ninth Circuit for departing from this non-existent rule. However, they cannot point to any case stating that courts are so narrowly limited that they may *only* consider physical, mental, or language impairments when deciding whether to appoint counsel, and such an interpretation would not comport with the plain language of the statute. § 1915(e)(1) ("The court may request an attorney to represent *any person* unable to afford counsel.") (emphasis added). Contrary to Petitioners' novel view, circuit courts admonish trial courts to consider a *range* of factors and circumstances, and where necessary to look beyond the enumerated factors to consider

"any special reason in a case why appointment of counsel would be more likely to lead to a just determination." *Hodge* 802 F.2d at 61-62; *McCarthy*, 753 F.2d at 838 (trial courts are to give careful consideration to *all* circumstances when considering appointment of counsel requests); *Hendricks v. Coughlin*, 114 F.3d 390 (2nd Cir. 1997) (reversing denial of counsel in § 1983 action; even though plaintiff was a "self described jailhouse lawyer," who had successfully navigated legal system in past lawsuits, analysis of all circumstances showed that he was not equipped to present case adequately in this instance). In short, suggesting that the Ninth Circuit erred by considering other factors diminishing Respondent's ability to present his case is a ludicrous basis for a challenge of the *Agyeman* ruling; the Ninth Circuit was entirely correct to consider the totality of circumstances.

Petitioners then complain that the Ninth Circuit improperly transformed itself into an advocate, raising arguments and strategies in its opinion that Respondent had not presented when proceeding *pro se*. The Ninth Circuit was not serving as a biased advocate in identifying the claims Respondent could and should have asserted. Rather, it was identifying basic, glaring legal errors Respondent made in pursuing his case in order to illustrate the complexities and legal pitfalls at issue here and the extent to which, notwithstanding his literacy, Agyeman was ill-equipped to pursue his case unaided. Moreover, Respondent's point on appeal was that he was unable to bring his case effectively because he was not represented in a complex case. Petitioner merely proves this point by emphasizing that Respondent failed to raise key arguments at the trial level. It would compound the initial injustice if Respondent were forever locked into the inadequately framed claims he asserted as an unrepresented litigant.

The court did not overstep its proper bounds by noting the arguments Agyeman should have made were he better versed

in the law. Contrary to Petitioners' characterization of the proper role of courts (Pet. Br. at 21), "it is the recognized duty of the trial court to insure that the claims of a pro se client are given a 'fair and meaningful' consideration." *Childs*, 705 F.2d at 922; *see also Strickler v. Waters*, 989 F.2d 1375, 1389 (4th Cir. 1993) (while court need not act as an advocate for a litigant, legitimate advisory role includes responsibility of ensuring that technical problems, such as those of pleading, do not prevent prosecution of pro se suits); *Hendricks* 114 F.3d at 393 (when court is forced into uncomfortable role of advocate, it serves interests of justice to appoint counsel).

Petitioners finally take issue with the Ninth Circuit's assessment of the complexities of Respondent's case. The *Agyeman* opinion sets forth a detailed analysis of these complexities, including the need to bring the lawsuit against the prison employees as a *Bivens* action, the potential action against the United States under the Federal Tort Claims Act, and the issue of whether he was entitled to a different standard of treatment as a result of his status as a civil rather than a criminal detainee. Other courts have reversed the denial of counsel based on the litigant's failure to understand his complex civil rights claims. *See Hendricks*, 114 F.3d at 394-95; *Abdul-Wadood v. Duckworth*, 860 F.2d 280, 289 (7th Cir. 1988) (legal and factual issues presented by §1983 claim "evidently exceeded" plaintiff's abilities, though they did not seem complex at first glance). While Petitioners disagree about the degree of complexity presented, the Ninth Circuit's analysis was thorough and in keeping with the application of the "exceptional circumstances" standard. In finding complexity here, the opinion hardly departs from the accepted course of judicial proceedings so as to merit this Court's review.

In conclusion, the Ninth Circuit correctly applied its well-established standard to a case that is on its face extraordinary.

Agyeman does not alter the high degree of discretion accorded to district courts; it merely confirms the established principle that the exercise of discretion is not unreviewable.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EDWARD GERBER, JESSE VALADEZ, AND FRED LAWRENCE,

Petitioners,

v.

EMMANUEL SENYO AGYEMAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondent errs in claiming that certiorari is unnecessary because all circuits apply essentially the same test under 28 U.S.C. § 1915(e)(1). The circuits apply different standards, the consequence of which is to shift scarce legal resources from those most needy to those most litigious—like Agyeman. This anomaly cries out for this Court's guidance. Further, the Ninth Circuit's opinion in this case was not "confined to an unusual set of facts." Respondent's chimerical portrayal of himself as an "innocent" victim "trapped" in isolation for simply using profanity is flatly contradicted by his own admissions, history of litigation and horrific disciplinary record. He engages in this subterfuge in order to persuade this Court, as he did the Ninth Circuit, that he was unable to act as his own advocate. The record belies the notion.

Agyeman sets unwise precedent that will encourage virtually every inmate or detainee in any prison around the country to claim that a mere lack of legal training entitles them to free legal counsel. Certiorari is needed to provide guidance on whether Congress or this Court intended 28 U.S.C. § 1915(e)(1) to apply to indigent plaintiffs like Respondent—literate, articulate and experienced in litigating straightforward claims.

ARGUMENT

I. CONTRARY TO RESPONDENT'S CLAIM, THE FEDERAL CIRCUITS *ARE* SPLIT ON THE STANDARD AND DEGREE OF DISCRETION DISTRICT COURTS MAY USE IN DETERMINING REQUESTS FOR COUNSEL

The only reason this Court has passed up two prior opportunities to set a uniform standard for evaluating requests under 28 U.S.C. § 1915(e)(1) is that neither prior case presented the significant concerns at issue here. *See Tabron v. Grace,* 6 F.3d 147 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994), and

Farmer v. Haas, 990 F.2d 319 (7th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993).[1] Both cases involved uneducated inmates inexperienced in litigation. Both inmates lost at the summary judgment stage (later reversed in *Farmer*), which demonstrated their lack of experience relative to the complexity of their cases. Even on the surface, both appeared to involve meritorious claims. *See Tabron* (failure to protect from reasonably foreseeable attack by fellow inmate) and *Farmer* (failure to provide treatment for inmate's undisputed condition of transsexualism). Under any circuit's test, those inmates warranted appointment of counsel. In contrast, this case (appointing counsel to a sophisticated litigant with straightforward, non-meritorious claims who succeeded in getting them to trial) illustrates the boundlessness of the test adopted by the Ninth Circuit in *Agyeman*.

Respondent goes to great lengths to make it appear as though all circuits apply a harmonious standard under 28 U.S.C. § 1915(e)(1). He maintains that the same legal principle guides every district court's discretion—whether denial of counsel would deny the plaintiff due process. This does not mean, however, that the courts' analyses or results are consistent. In truth, the lack of a uniform standard results in a system that thwarts the very principle supposedly guiding these decisions. And while most circuits do assess the "core" similarities that Respondent identifies (complexity of the case relative to the inmate's ability to represent himself and merits of the claim), the factors utilized and the degree of deference exercised varies dramatically from circuit to circuit. The Third Circuit expressly rejected what it called the "limitation" of the "exceptional circumstances" test as "not supported" by § 1915(e)(1). *Tabron*, 6 F.3d at 150. Even the "seminal"

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[1] In *Tabron*, the Third Circuit rejected the "exceptional circumstances" test. 6 F.3d at 155. *Farmer* opted for a "stripped-down" alternative to the Seventh Circuit's multi-factor test in *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981).

case Respondent cites recognized that "there are few hard and fast rules governing appointment of counsel" under section 1915(e)(1). *Maclin*, 650 F.2d at 887.

Certain circuits use a broad approach, giving the district courts broad discretion in applying enumerated factors. This sharply contrasts with the mandate of other circuits that counsel may be appointed only in "exceptional circumstances." *Compare Maclin*, 650 F.2d at 887-88, and *Hodge v. Police Officers*, 802 F.2d 58, 61 (2nd Cir.1986), *with Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975); *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993), and *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980). Still others call their standard "exceptional circumstances," but apply a multiple factor analysis. *E.g., DesRosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991); *Cox v. Mitchell*, 2004 WL 2545034 (N.D.Tex. 2004). Far from demonstrating their "core similarity," these cases highlight the circuits' dissimilar tests, which produce divergent results for similarly situated plaintiffs.

Respondent claims that virtually every one of Petitioners' cases "cite[s] to, and adopt[s] factors from *Maclin*," which he claims "underscores that the factors are indistinguishable in principle." To the contrary, none of Petitioners' Fourth, Sixth or Ninth Circuit cases cites to *Maclin* or its analysis. *See, e.g., Cook*, 518 F.2d 779; *Lavado*, 992 F.2d 601; *Aldabe*, 616 F.2d 1089; *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984); *Strickler v. Waters*, 989 F.2d 1375 (4th Cir. 1993); *Liggins v. Rivas*, 990 F.2d 1258 (9th Cir. 1993).[2] Respondent also cites *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 800 (9th Cir.

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[2] The one case Respondent claims to not rely on *Maclin* actually does so. *See Poindexter v. F.B.I.*, 737 F.2d 1173, 1189 (D.C. Cir. 1984). Moreover, Petitioners did not cite *Poindexter* and the other cases at pp. 16-17 as examples of circuits that diverge from a *Maclin*-type multiple factor test. Those cases were cited to show that even circuits giving trial courts broad discretion under a multiple factor test vary as to what factors should be considered.

1986), for the proposition that the Ninth Circuit affords "considerable discretion" to district courts in determining whether counsel should be appointed. But *30.64 Acres* presented a different question—whether the district court had the ***authority*** to appoint counsel in an eminent domain action. After holding that it did, the court emphasized that while district courts have considerable discretion, grants of counsel should be rare and are only appropriate where "exceptional circumstances" exist. *30.64 Acres*, 795 F.2d at 799-800. This reinforces Petitioners' point that discretion to appoint counsel is much broader in the Second, Third and Seventh Circuits, where district courts are not bound by the "exceptional circumstances" limitation. *See also Farmer,* 900 F.2d at 323 (Seventh Circuit shall only override district court's discretion in appointing counsel in "extreme cases").

Adopting a uniform standard would not "inevitably detract" from the courts' ability to respond to individual circumstances, as Respondent argues. Allowing *Agyeman* to stand will inevitably result in the increased frequency of appointed counsel to "jailhouse lawyers" at the expense of those litigants who truly cannot effectively articulate themselves or handle their own representation. Clear guidance from this Court on the standard and its proper application would further the intent of Congress and this Court in assuring that indigents who ***truly*** need an attorney in a civil case will have one. Thus, rather than being "rigid," a uniform standard would produce the fairest results under 28 U.S.C. § 1915(e)(1) and enhance due process protections for those most in need.

II. RESPONDENT IS NOT ENTITLED TO APPOINTED COUNSEL UNDER ANY CIRCUIT'S STANDARD

A. The record does not support Respondent's claim that he was entitled to appointed counsel because he was an "innocent" detainee "trapped" in isolation and unable to effectively represent himself.

Respondent makes numerous inaccurate "factual" assertions upon which he bases his analysis under the "exceptional circumstances" test. For example, in an ongoing portrayal of himself as an "innocent" detainee, Respondent criticizes Petitioners' statement that he was incarcerated as a result of a DUI or for passing a bad check. Yet Agyeman himself so testified at trial. (TR 4/22/03 at 129:23-130:23, TR 4/23/03 at 238:3-18, TR 4/23/02 at 237:10-13). Respondent also presents an inaccurate ugly image of his confinement in CCA, claiming he was treated "as if he had been a convicted killer," "kept in solitary confinement, shackled in leg irons and chest chains, and . . . subjected to physical abuse by guards." (Rsp. Br. at 4). This pathetic description of Respondent's alleged conditions of confinement is notably absent from the lower courts' briefing, record and decisions. The only truthful fact Respondent has proffered is that he was often segregated—a fact the jury found was the result of Respondent's incessantly aggressive, defiant behavior.[3]

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[3] In addition to the disciplinary problems listed in the Petition, these included refusing to mop the floor, saying "I'll mop what I want to mop"; refusing to show the chaplain a pass, stating, "why should I" and "what the hell kind of chaplain are you anyway? You're just full of shit"; refusing to comply with an order to move to another cell so he could have the bottom bunk he requested; refusing to make his bed, saying, "why do I have to make my bed?" and that the prison rules are "bullshit"; threatening an officer to "watch your ass" for telling him to finish his phone conversation because lunch was ready; throwing a cup of water at

Respondent also accuses Petitioners of "misrepresenting the record" in stating that he only asked for counsel once before trial. Yet Respondent never provides a date or any proof of a request other than the one noted by both the district court (App. 7a) and the Ninth Circuit (App. 3a) on August 24, 2000. Respondent then claims that Petitioners are "misleading" when they state that his lack of law library access was rectified once he transferred out of the Maricopa County Jail two and a half years before trial. Yet the record shows that the ***only time*** Respondent complained of no library was during his three month stay at that jail. Although Respondent **now** complains he had no library access, he never complained so or renewed his request for counsel at any point over the next three years. Moreover, his argument misrelies on *Casey v. Lewis*, 834 F.Supp. 1553, 1556-57 (D.Ariz. 1992), which discussed lack of library access in Arizona's ***state*** prisons, not the private CCA facility at issue.[4] Unlike Arizona's state prisons, CCA has law libraries on site and personnel to assist with research and preparation. Inmates in segregation have access to the library through the librarian

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the wall next to an officer and telling him to "mind his own damn business" when that officer overheard him making threats about another officer; becoming combative and difficult to control during an escort, telling an officer to "get your fucking hands off me"; refusing to walk from van to hospital, stating, "I need a fucking wheelchair. I'm not walking no fucking where"; refusing to clean his cell, telling the officers to clean it themselves; throwing Kool-Aid and water on his cell floor, blocking the door with his body and telling an officer to "get out of here" when told to move to the back of the cell because he was getting a cell-mate; telling an officer who asked how he was doing to "Piss off. I'm tired of talking to assholes"; and injuring an officer who was attempting to handcuff him. These examples demonstrate a serious ongoing disciplinary problem requiring segregation from other inmates and officers—not simply a problem with profanity.

[4] Furthermore, this Court reversed *Casey* and held that governmental entities, including prisons, have no affirmative obligation to provide law libraries. *Lewis v. Casey*, 518 U.S. 343 (1996).

who brings them whatever materials they need. Frankly, Respondent's numerous pleadings containing legal citations and his success in bringing his claims to trial render this *post hoc* claim incredible.

Respondent also accuses Petitioners of "dramatically overstat[ing] Respondent's legal prowess," claiming that most of his 18 lawsuits relate to this case. The record, which does not show *any* duplicative lawsuits, belies that assertion. Finally, the "host of other impediments" Respondent claims are either not supported by the record, not reflected in the actual course of litigation, or were addressed by the District Court prior to or during trial. The Magistrate issued separate orders regarding the Respondent's "lost" legal papers and his desire to depose his opponents. (App. 10a).

B. Respondent is a literate, educated plaintiff capable of effectively articulating his claims, which were simply not complex.

Respondent cites no case holding it an abuse of discretion to deny counsel to a plaintiff who, like himself, is literate, educated, and able to articulate a straightforward claim. Instead, he asserts that Petitioners' cases are inapposite because they involve convicted prisoners, whereas Respondent's status was purely "civil." Petitioners can find no such distinction in the caselaw.[5] Further, that none of Petitioners' cases involves a *Bivens* issue—one of the Ninth Circuit's "complexities"—is a red herring. *Bivens* and §1983 actions are analogous, and

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[5] A number of cases denying requests under 28 U.S.C. § 1915(e)(1) do not involve convicted inmates. *E.g., Gorenc v. Salt River Project Agricultural Improv. & Power Dist.*, 869 F.2d 503 (9th Cir. 1989) (irrigation district employee suing employer); *Richards v. Harper*, 864 F.2d 85 (9th Cir. 1988) (citizen suing legislators); *Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (divorced woman suing ex-husband, purchasers of marital property and various judges); *Hudak v. Curators of Univ. of Missouri*, 586 F.2d 105 (8th Cir. 1978)(former assistant professor suing university officials).

Petitioners never raised this technicality. The Ninth Circuit's other two "complexities" are equally flawed. That Respondent theoretically could have added the United States as a defendant or that, in the Ninth Circuit's view, he did not properly frame a non-issue, are not proper grounds for appointing counsel under *any* case from *any* circuit.

Petitioners cited numerous excessive force cases that were found to be straightforward and not deserving of appointed counsel. Instead of addressing these cases, Respondent conclusorily remarks that Petitioners rely on nothing but "rank speculation." It is inconceivable under what logic a circuit court would find this excessive force case too "complex" for a literate, educated plaintiff like Agyeman to litigate. Nor does the "credibility factor" distinguish Petitioners' cases, as Respondent argues. The courts in those cases only noted that relative to the inmates' abilities and the claims' minimal complexity, the credibility issues did not warrant appointment of counsel. That is entirely consistent with the Magistrate's ruling here.

As shown in the Petition, Respondent—literate, educated, and able to effectively present his claims—simply does not present the type of civil litigant for whom counsel should be appointed under 28 U.S.C. §1915(e)(1). Courts generally find abuse of discretion where counsel is denied to plaintiffs with physical or mental impairment, or limited English proficiency. Even *Maclin*, the "seminal" case cited by Respondent, involved a paraplegic "confined to a wheelchair and in constant pain, [who] can hardly be thought capable of conducting an adequate examination of his own medical records, let alone of developing evidence of the medical treatment he ought to have received." 650 F.2d at 889. *Maclin* had no "workable knowledge of the legal process," and his "lack of familiarity with legal procedures" resulted in premature dismissal of his claim. *Id.* No such facts appear in this record.

III. THE NINTH CIRCUIT'S OPINION SETS A DANGEROUS PRECEDENT REQUIRING APPOINTMENT OF COUNSEL IN VIRTUALLY EVERY CIVIL LAWSUIT BROUGHT BY AN INDIGENT INMATE OR DETAINEE

Respondent's ultimate argument is that he was under an "insurmountable disadvantage" because he was "left to try the case unassisted against opponents represented by one of the most experienced litigation firms in Arizona [with] unmatched trial and appellate experience.'" (Rsp. Br. at 6). This "David versus Goliath" characterization reinforces Petitioners' argument by revealing Respondent's true aims: to expand the standard for appointing counsel so that it is required in ***every*** lawsuit in which an indigent inmate or detainee—who by definition will never have any legal training—faces an opponent represented by counsel. This is not the proper standard for appointment of counsel in civil lawsuits. As Judge Posner poignantly expressed:

> No doubt a good lawyer would have done better than Farmer, and might have won; but if this were the test, district judges would be required to request counsel for every indigent litigant. . . . The statute confides the matter to the district judge's discretion, ***which we shall override only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer . . .***

Farmer, 990 F.2d at 323 (emphasis added). Even a cursory review of this record shows that this case comes nowhere close to this standard.

Respondent's attempt to minimize the likely impact of the *Agyeman* opinion is naive. If Respondent is entitled to free representation for his civil lawsuit, then most of the in-

carcerated or detained population in this country will likewise be entitled. Unless this Court grants certiorari and defines a clear, uniform standard, *Agyeman* will undoubtedly unleash a bounty of requests and orders for appointment of counsel. This dangerous precedent will shift scarce legal resources from those inmates or detainees who need them most to those like Agyeman who are simply the most litigious.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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